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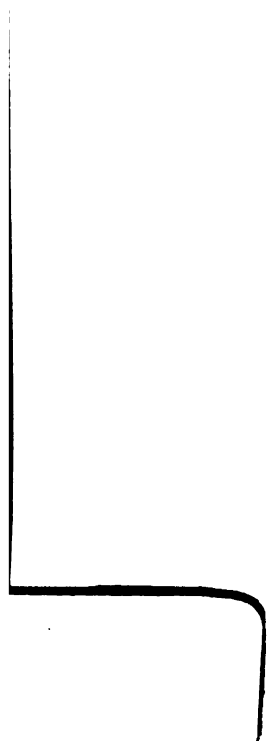
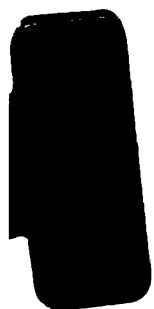
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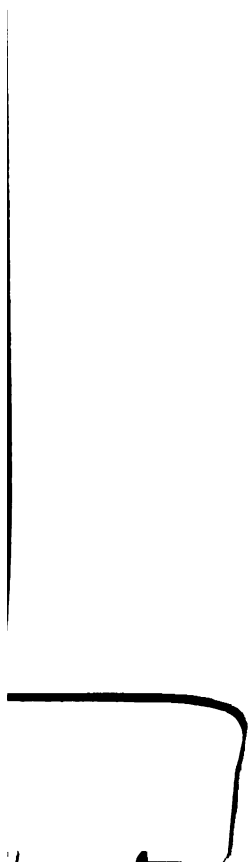
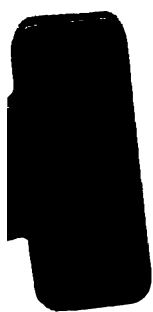
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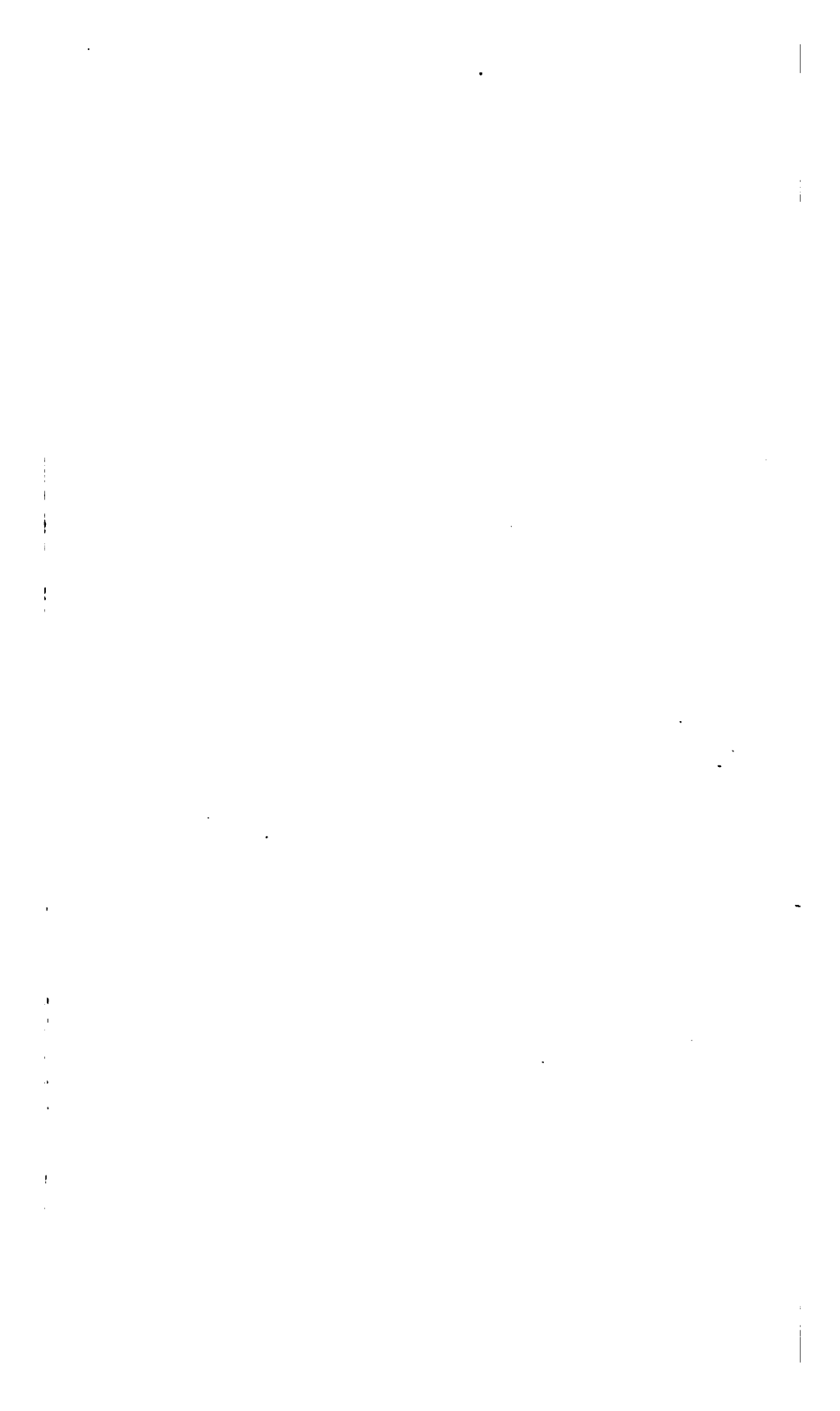
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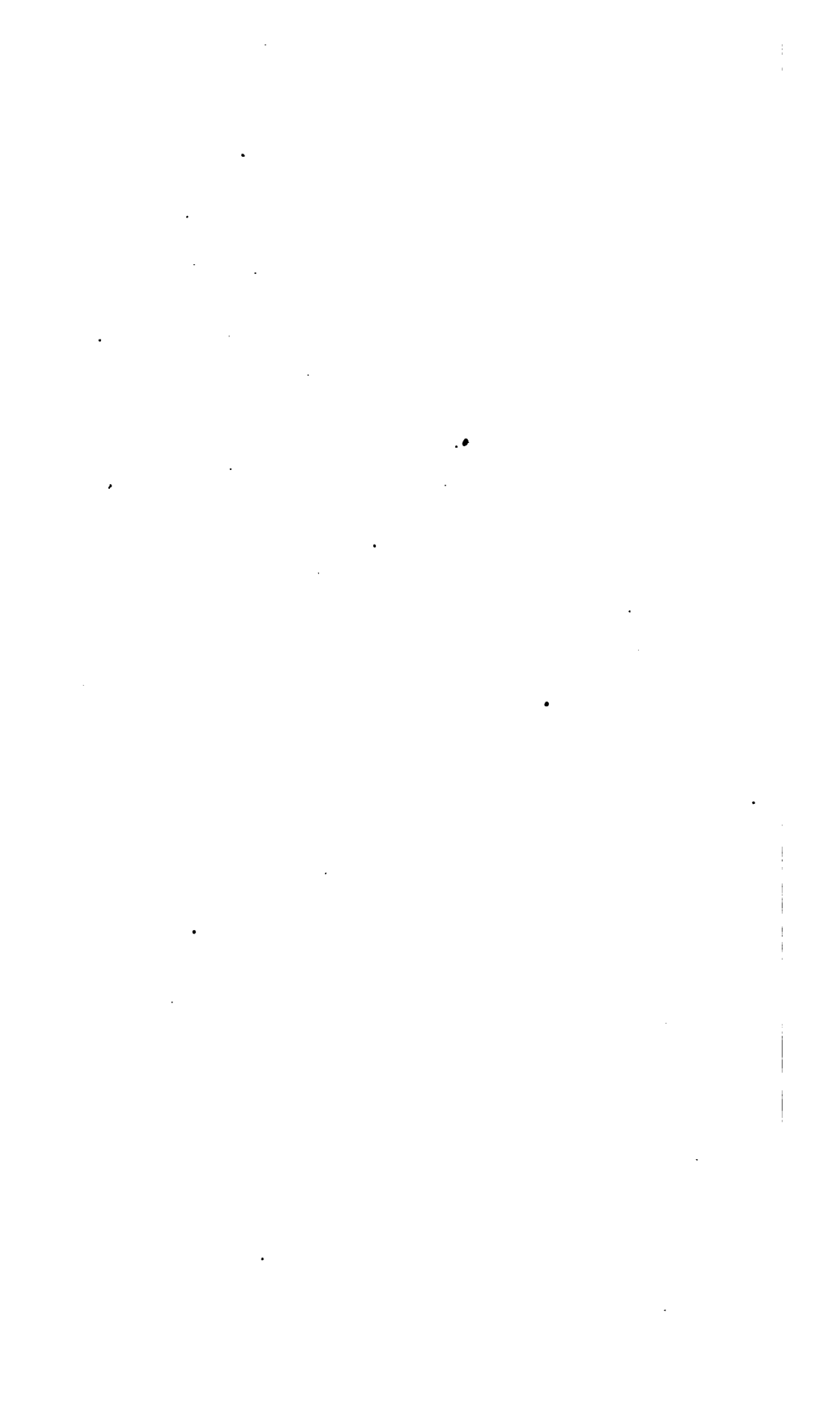
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REPORTS
OF
CASES ARGUED AND DECIDED
IN THE
CIRCUIT COURT OF THE UNITED STATES,
FOR THE
SEVENTH CIRCUIT.

BY JOHN McLEAN,
CIRCUIT JUDGE.

VOL. IV.

CINCINNATI:
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JUDGES

Whose Decisions are Reported in this Volume.

JOHN McLEAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES,
AND JUDGE OF THE SEVENTH CIRCUIT.

HON. ROSS WILKINS,
DISTRICT JUDGE FOR MICHIGAN.

HON. H. H. LEAVITT,
DISTRICT JUDGE FOR OHIO.

HON. E. M. HUNTINGTON,
DISTRICT JUDGE FOR INDIANA.

HON. NATHANIEL POPE,
DISTRICT JUDGE FOR ILLINOIS; WHO DIED IN 1849, AND WAS
SUCCEEDED BY THE
HON. THOMAS DRUMMOND.

1805C

JUDGE POPE.

SINCE the publication of the third volume of these Reports, it has pleased God to call from life the Honorable NATHANIEL POPE, District Judge of Illinois. He died, after a brief but severe illness, at St. Louis, shortly after the adjournment of his court, at Springfield, in June, 1849, about sixty-six years of age.

Judge POPE was among the early settlers in Illinois. He first established his residence at Kaskaskia, and continued to reside there until within a few years before his death. The place was abandoned by him, probably, from the repeated floods in the Mississippi, of late years, which inundated the town and rendered it unhealthy. When he first made Kaskaskia his residence, it was, in population and intelligence, the first place in Illinois. It was the seat of government for the territory.

On the organization of the Illinois Territory, in 1809, he was appointed, by Mr. Jefferson, Secretary of the Territory; which office he filled with credit to himself and usefulness to the public. In 1819, the State of Illinois was organized, and Judge Pope accepted the appointment of District Judge of the United States. At the time of his death, he had been thirty years on the bench, a length of time, of which we have few examples in our country.

While Secretary of the Territory, and until he was appointed to the bench, Judge Pope practiced his profession; and, from the

first, stood at the head of the bar in the territory. He had influential connections and friends in Kentucky, and elsewhere, which, with his own high standing, gave him no small influence with the earlier administrations of the General Government. And in his territory and state, he was a very prominent and leading citizen. His independence and strict adherence to the political principles he avowed, which may be classed with the Jefferson school, left him behind the progress of others, who professed to be of the same school.

He was a man of decided talent. He never sought to become conspicuous as a speaker on the stump, at the dinner table, or in any such ephemeral exhibitions. But he was a man of much research, and of deep thought. He had a very strong and vigorous mind. In conversation, and in his opinions on the bench, and elsewhere, he was distinguished for the soundness of his positions, and the force of argument by which he maintained them. His arguments were drawn more from the resources of his own mind, than from the hackneyed views of others. Whilst, in his legal opinions, he showed great respect for authority, he was never satisfied where his own judgment did not lead to the same conclusion. I was associated with him twelve years on the bench, and I seldom differed from him, in an opinion pronounced, without feeling solicitude in regard to my own views.

He was an able common lawyer, and there were but few persons, in any part of our country, whose constitutional opinions were entitled to higher respect. With the history of the Constitution he was well acquainted; and he understood well the respective powers of the Federal and State Governments. He seemed to be more desirous of discharging his duty faithfully, than of leaving memorials of his acts. He reported but few of his judicial opinions, two or three of which give value to this volume.

No man entertained loftier views of the duties of a Judge, and no one ever exercised a purer judgment in the decision of causes. Firm in his convictions, he never yielded them without being convinced of error; and then no one conformed to right and justice more cheerfully than he did. In this he set a beautiful example of an unbiassed judgment, however strong and firm, ready to yield to the force of argument. He was above the infirmity of narrow minds, which considers a change of opinion as evidence of weakness.

The State sustained a great loss in the death of this distinguished man. To his family the loss was irreparable, as he lived in their affections in no common degree. And associated with him as I had been, for so many years, I heard of his death with the deepest sensibility, and sincerely deplore his loss.

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CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—JUNE TERM, 1845.

KETCHUM AND WIFE v. THE FARMERS' LOAN AND TRUST CO.

The Court have no jurisdiction of a case where the complainant, and one of the party defendants, reside in the same State.

In such a case, consent can not give jurisdiction, and a decree so entered, will be set aside on bill of review.

To give jurisdiction, the citizenship of the stockholders of a bank need not be averred, but the place where the bank is located must be stated.

Mr. Romeyn for the complainant.

Mr. Barstow for defendant.

OPINION OF THE COURT.

THIS is a bill of review, filed by the complainants, to reverse a decree entered lately in this court, for errors on the face of the decree. The original bill was brought to foreclose a mortgage executed by the present complainants to the North American Trust and Banking Company, which had been assigned to the Farmers' Loan and Trust Company, both of the State of New York. Ketchum and wife were made defendants, and so was the Canal Bank of New York.

The answers being filed, the parties, by their counsel, entered into a stipulation on which a decree was rendered, without calling the attention of the Court to the subject.

Ketchum and Wife v. The Farmers' Loan and Trust Company.

And the principal ground on which a reversal of the decree is, a want of jurisdiction.

On the part of the defendants it is contended that a decree or judgment entered by consent, is a waiver of error. And that it can not be set aside, either by a rehearing, appeal, or bill of review. That this is laid down in absolute terms by writers on chancery practice, and that it is sustained no less by reason than by authority. 2 Smith's Ch. Pr. 560; 1 Barbour's Ch. Pr. 373; *Webb v. Webb*, 3 Swarts, 658; *Smith v. Turney*, 1 Vernon, 273. It is said that a decree by consent, is binding, unless procured by fraud. 5 John. Ch. Rep. 564; Ambler, 229.

It is also urged, that the want of jurisdiction in the original case is a preliminary objection, which should have been made at or before the hearing; and that it can not now avail the plaintiff to this bill. That it is a well settled rule, that a party whose interest is not affected by the decree, can not file a bill of review; and that, if the Court had not jurisdiction over one of the party defendants, the interests of such party are not affected by the decree.

It is also contended, that the want of an averment of citizenship of the stockholders of the Farmers' Loan and Trust Company, is not necessary, since the decision in 2 Howard, 566.

Under the above decision, the citizenship of the stockholders of a bank need not be averred, but it is necessary to state where the bank is located, as the place of its business.

A want of an averment of citizenship where jurisdiction is exercised, on that ground, the Supreme Court have held, does not make the proceedings void; but they may be reversed on writ of error. And it has been often held, that consent can not enlarge the jurisdiction of the courts of the United States. Where there is a want of jurisdiction upon the face of the proceedings at law, they will be reversed on a writ of error, or in chancery the decree will be reversed on a bill of review.

There was clearly no jurisdiction in the original case. The bill was filed by the "Farmers' Loan and Trust Company" of the State of New York; and the Canal Bank, one of the parties against whom the decree was entered, was also of that State. For this reason, the decree must be set aside; and the parties, if they desire it, may have leave to amend their pleadings, etc.

Leave given to amend, by making the Canal Bank co-complainant.

THE UNITED STATES v. BENAJAH H. DEMING.

Where such words of description are used in an indictment, as to have an application only to the proper person, it is sufficient, although the words of the statute be not used.

On a charge of perjury by a petitioner in bankruptcy, the indictment need not set out, particularly or substantially, the petition.

A general reference to it, which shall show its character and object, is sufficient.

To sustain an indictment for perjury, the oath must be administered by some one authorized.

An authority to a county clerk, to swear petitioners resident in his county, does not give him power to administer an oath to one who resides in another county.

District Attorney appeared for the plaintiffs.

Messrs. *Abbott* and *Lathrop* for defendant.

OPINION OF THE COURT.

THIS is an indictment for perjury, in swearing falsely in a proceeding in bankruptcy, the jury having found a verdict of guilty. A motion is now made to arrest the judgment on the following grounds:

1. Because there is a misnomer in the indictment, as to the court before whom the proceeding was had.

The 7th section of the bankrupt act provides that all peti-

tions in bankruptcy shall be had "in the district court," etc., and the allegation in the indictment is of a petition made "to a judge sitting as a bankrupt court." And it is contended, that this, being descriptive of the personal of the judge, must be substantially, if not strictly, set out in the indictment. That the description given might refer to the circuit court, etc.

As no judge can sit in bankruptcy except the district judge, we think the indictment in this respect is sufficient. The circuit court has jurisdiction to hear appeals in bankruptcy, from the bankrupt court, but the circuit judge, in hearing these appeals, can not be said to sit in bankruptcy. Such a sitting can only apply to the district judge.

2. The indictment is alleged to be defective in not setting out the petition with sufficient particularity and certainty.

It is argued, if the prosecutor undertakes to set out proceedings material to the offense, even unnecessarily, he must do it with the same certainty as if they were required. That formerly, all the proceedings in the course of which the perjury is charged to have been committed, were required to be set forth, and though now excused by statutes both in England and this country; yet, if the prosecutor does not avail himself of the statute, he is held to the ancient strictness. 2 Chitt. Crim. Law, 307; 2 Russ. on Crimes, 536.

It is unnecessary to set out the petition, substantially or otherwise; a mere reference to its character and object is sufficient. And we do not think that the indictment contains any allegations or statements which bring it within the rule laid down by the counsel. We recognize the principles relied on, but we do not think they apply to the indictment as framed.

3. The third ground is, that the alleged false oath was not administered by any person legally authorized.

The bankrupt act requires that petitions shall be sworn to; but does not declare before whom the oath shall be taken. The district court, under the act, adopted a rule which authorizes the clerk of the district court to administer oaths gener-

ally to petitioners; and another, as follows: "Ordered, that the petitioners residing out of the county of Wayne, may verify their petitions before the county clerk of the county in which they reside; and the clerks of the different counties of this district are hereby appointed commissioners to administer oaths or affirmations to petitioners applying for the benefit of the bankrupt law."

The indictment shows that the defendant was a resident of the county of Jackson, but it alleges that he took the oath before the clerk of Washtenaw county. And the question is made, whether he had the power to administer the oath.

As clerk merely, we suppose he had not the power. But had he not authority, under the rule of the court? The first part of the rule limits the authority of the clerk to administer the oath, to residents in his county. The words are, that the petitioners may take the oath "before the county clerk of the county in which they reside." But the prosecutor insists, that the latter part of the order enlarges the power of the clerk, as it appoints him a "commissioner to administer oaths or affirmations to petitioners applying for the benefit of the bankrupt law."

In giving a construction to this order, the whole of it must be taken together. The clerks were not appointed commissioners generally, under the act of Congress, but merely for the special purpose of administering oaths to petitioners, and to persons, as it would seem, who reside in their respective counties. We think that this is a fair construction of the rule, and, consequently, that the clerk of Washtenaw county had no power to administer an oath to the defendant, who was a citizen of Jackson county.

The judgment is arrested.

James F. Cooper v. James W. Gordon and Gibbs.

JAMES F. COOPER v. JAMES W. GORDON AND GIBBS.

Where there are three joint indorsers, and the process is served on two of them, under the act of 1839, the suit may be prosecuted against the two.

A plea in abatement can not be retained, on the ground that the other joint indorser is a citizen of another district.

Mr. *Hand*, appeared for the plaintiff.

Mr. *Romeyn*, for defendants.

OPINION OF THE COURT.

THIS action is brought by the plaintiff, a citizen of New York, against the defendants as indorsers of a note. The defendants pleaded in abatement that one Sanford, who is living, was a joint indorser with defendants. To this the plaintiff replied, that Sanford was not a citizen of Michigan, but of another State, at the time the suit was commenced.

The pleadings raise the question whether, under the act of Congress of the 25th February, 1839, this action is maintainable. That act provides, "that where any suit at law or equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the misjoinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

Under this act, where an individual is served with process, he being within the district temporarily, but a citizen of another district, he may waive his objection to being sued out

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of his district, and appear in the suit. But there can be no doubt under the act that a service of process being made on a part of the defendants, they being citizens of the district, that the suit may be prosecuted against them. The statute was intended to provide for a case like this; and words could not be more appropriately used to effectuate the object.

The defendants are both citizens of Michigan, and having been served with process they are bound to answer. The demurrer is overruled.

MOWER AND STEVENS v. BURDICK.

A plea which argumentatively denies a fact averred in the declaration, is demurrable.

The traverse must be direct.

Messrs. *Barstow & Douglass*, for plaintiffs.

Messrs. *Joy & Porter*, for defendant.

OPINION OF THE COURT.

THIS action is brought upon a sealed instrument, dated the 9th of June, 1839, in which the defendant agreed to indemnify the plaintiffs and save them harmless against the payment of a certain promissory note, made and signed by the plaintiffs jointly and severally, with one Samuel Mower, then of Michigan city, Indiana, for the sum of seventeen hundred dollars, payable in one year, for the benefit and use of the said Samuel Mower. And the plaintiffs aver, that on the 12th day of July, 1842, they paid the said note. The second count in the declaration was substantially the same on another note.

The defendant pleaded that the said Samuel Mower did himself take up and pay each of the said several promissory notes when they became due, without this, that the said plaintiffs paid the sums due upon the said promissory notes

when they became due, or any part of all or either of them in manner and form, etc., which the said defendant is ready to verify. To this plea, the plaintiffs demurred.

This plea is bad. The plaintiffs aver that they paid the notes after they became due; the plea alleges that Mower paid them when they became due, which is not a direct answer to the averment in the declaration. This may be a good argument to show that the plaintiffs could not have paid the notes as they allege, but it is an argumentative denial of the fact stated in the declaration, which should be traversed. Stephen Pl. 385, 175-6-7, 181.

The case was discontinued.

ROOT v. WALLACE.

A note issued by a bank, in violation of its charter, is void.

It is also void if issued in contravention of a general law in force at the time the charter was adopted, and such note is void in the hands of a *bona fide* holder.

All who receive notes of a bank are bound to take notice of the powers of the bank, as granted in its charter.

A void note being indorsed, can not be given in evidence, to support an action by the indorsee against the indorser.

The contents of such note can not be admitted, in support of an action brought on the note.

The indorsee may recover against the indorser by showing the consideration paid for the note.

Mr. *Taylor* for plaintiff.

Mr. *Romeyn* for defendant.

OPINION OF THE COURT.

THIS action was brought on notes alleged to be void. The plaintiff was an assignee. A non-suit having been entered on the trial, a motion is now made to set aside the non-suit.

By the safety act of Michigan of 1836, it is provided that no monied corporation subject to it, "shall issue any bill or note of the said corporation, unless the same be made payable

on demand and without interest." The notes in question were issued by the Bank of Saline, in contravention of this provision.

On the part of the plaintiff it is contended, that whether the notes are void or not, can not be inquired into in a suit against the indorsers; that the indorsement is conclusive evidence of the making and legality of the notes. That the contract of indorsement on which the plaintiff seeks to recover, is a new and distinct contract, equivalent to the drawing of drafts by the indorser on the maker of the notes in favor of the holder, and by which the indorser promises to pay the money mentioned in the notes, if the maker fails and the indorser is notified. Baily 149; 1 Hall R. 70; Doug. 514-7; Cor. Rep. 496; 15 John. 241; 16 John. 201; Chitty on Bills, 265-6; 3 Peters, 474.

In *Wiggin v. Rush*, 12 John. 310, it was held, that notes void *ab initio*, are equally so in the hands of a *bona fide* holder. But the holder in this instance had notice. The safety fund act was a public law, and all who deal in the paper of the bank, are bound to take notice of its provisions. If a corporation exceeds its powers, its acts are void. They are not made good by an alleged want of notice of a defect of power.

It is also argued, that if the note be void, as a security, the original loan is not destroyed, and that the notes may be given in evidence, under the common counts. That, at least the contract of indorsement is evidence, it being equivalent to a draft. That if the notes be void on the ground of illegality, usury or forgery, yet the indorsee may recover of the indorser.

The question is not whether the indorsee may not recover from the indorser the consideration paid, but whether the indorsements on the notes are evidence of the consideration.

An indorser is estopped from setting up an illegality not apparent on the face of the note against a *bona fide* holder,

without notice. By his indorsement he guarantees that the note is what it purports to be. In this case the defendant can not deny that the notes were in fact executed by the officers of the bank, and that they are post notes of the Bank of Saline. But the illegality of the notes are apparent upon their face.

The rule that an indorser can not show the illegality of the paper does not apply to an indorser with notice. 3 Kent, 80; Ohitt. on Bills, 92, 112; 6 Term Rep. 61. If the illegality of the notes be established, the indorsee can not recover from the indorser, until he show that he took the note for value. *Heath v. Sanson*, 2 Barr & Adol. 291; 2 Starkie Rep. 307; Madd. & M. 240; 2 Camp. 574. He must not only show that he paid value for the notes, but it must appear that he had no notice of the fraud. 6 Ward, 691; 9 Ward, 172.

In the case of the *Utica Insurance Company v. Scott*, 19 John. 6, the court say that a note taken for money lent by the company was void, yet that the money loaned might be recovered; but that the action could not be sustained on the note, as that was void. In *Utica Insurance Company v. Kip*, 8 Cowen, 20, the second count of the declaration was for money lent. The plea admitted the loan by the plaintiffs to the defendants; and the court held that the plaintiff could recover on the *admission*, but not on the note.

The note being void, its contents can not be received in evidence to support an action upon it.

A case involving the same principle, *Root v. Godard*, was decided by this court in 3 McLean, 102. The motion to set aside the non-suit is overruled.

BARGH AND ARCOLARIUS v. PAGE, INGERSOLL, ET AL.

The citizenship of a person not served with process, who is a joint promisor, must appear in the declaration.

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If he be a citizen of the same State as the plaintiff, the court can take no jurisdiction.

Messrs. *Bates, Walker & Douglass*, for plaintiffs.

Messrs. *Witherell & Buell*, for defendants.

OPINION OF THE COURT.

THIS is a motion to set aside the verdict obtained by the plaintiffs, for the reasons assigned.

The second ground of the motion is, that there is no averment of citizenship of Timothy Page, one of the parties to the note, but who was not served with process. By the plaintiff, it is contended that the non-joinder of a joint contractor can only be pleaded in abatement. *Cabell v. Vaughan*, 1 Sand. Rep. 290, 291, 6 N. 4. *Tice v. Shute*, Burr. Rep. 2611. *Minor v. Mechanics' Bank of Alexandria*, 1 Peters Rep. 316; *Gilmor v. Rives*, 10 Peters Rep. 298.

This was undoubtedly the rule at the common law, but the limited jurisdiction of this court will not admit of the same rule. The circuit court can take jurisdiction from the citizenship of the parties, only, when they reside in different States. By the act of 1839, if process shall not be served on all the defendants, the plaintiff may proceed to judgment against those who are before the court, provided it can be done without prejudice to those who have had no notice. But if the absent defendants live in the same State with the plaintiff, the court can not take jurisdiction, as between them and the plaintiff, as the suit would not be, as to them, between citizens of different States. But with this exception, the court may give judgment, though a part of the persons named as defendants have not been served with process. Against those who are served, the judgment will be good.

In the special counts, there was an averment of non-residence as to T. Page, on whom process was not served, but those counts were discontinued, and in the general counts there was no such reference to his citizenship as to make the

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avermment, in this respect, in the special counts, a part of the general. As this must appear on the face of the declaration, there was no necessity to plead an abatement, to take advantage of it as at common law.

Upon the whole, we think the verdict must be set aside on the point reserved, and leave given to the plaintiffs to amend their declaration.

SUYDAM, ET AL. v. BEALS, FORSYTHE, WELLES, ET AL.

A creditor's bill is sustainable in the courts of the United States under the mode of proceedings, as authorized in chancery by State statutes.

And in this form, property fraudulently conveyed, or choses in action, may be subjected to the payment of judgments.

The surrender and cancellation of a deed, does not reinvest the title in the grantor.

The return of the executions on the judgment *nulla bona*, is sufficient, without stating that search was made for property by the officer.

The executions were returned before the return day, but the bill was not filed until afterwards.

On a bill in chancery, the errors of a court of law can not be corrected.

A court of law gives relief on terms which a court of equity can not impose.

The demurrer being overruled, and the other defendants failing to answer, the bill as to them may be taken as confessed.

Mr. *Seaman* for complainants.

Mr. *Talbott* for respondents.

OPINION OF THE COURT.

THIS is a creditor's bill, which represents that at October Term, 1839, a judgment was obtained by the complainants against F. and A. Beals, for twelve hundred and sixty dollars. That several executions issued on the judgment, several of which were returned *nulla bona*; and that on the 26th August 1840; by virtue of another execution, a levy was made on lots 5, 6, 7, and 8, in the eastern division of Schoolcraft, and also on other lands. That the judgment debtors have choses

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in action, equitable interests, etc., which the bill seeks to reach, to satisfy the judgment.

And the bill alleges that the defendants at law, on or about the 18th of May, 1841, assigned a large amount of effects and choses in action to Welles, the defendant, which it prays may be made subject to the judgment. That lots 5, 6 and 7 were owned by Grant, who sold them to the defendants in the judgment in July, 1839, for which they paid him fifteen hundred dollars. A deed was made for the lots by Franks, in whom was vested the legal title; but this deed was never recorded. That the defendants entered into possession of the lots, made valuable improvements thereon, and are still in possession of them. That lot No. 8, being owned by Welles, was sold by him to A. Beals, and he received the purchase money. That A. Beals sold the lot to the defendants in the judgment, and directed Welles to convey it to them. That this bill was filed September 3d, 1839, and that on the 7th of October following, F. and A. Beals sold their house and their store of goods, to Kimberly, one of the defendants. That on the same day, F. and A. Beals gave up to Franks, to be canceled, their deed of said lots 5, 6 and 7, and procured a deed for the same to be made to A. Forsythe, without consideration; and also, at the same time, procured a deed to be made from Welles to Forsythe, for lot No. 8. These conveyances, the bill charges, were made to delay and defraud the plaintiffs. That Forsythe was the father-in-law of A. Beals, and that he had notice of the facts alleged.

Welles demurred to the bill, and Forsythe answered, admitting many of the allegations of the bill, but denying that the conveyances were made to him without consideration. On the contrary, he says that A. Beals owed him \$613, and that the lots were sold in discharge of that debt; and that he had become security for A. Beals to the amount of twelve hundred dollars, etc.

The deed from Franks to F. and A. Beals, vested the title

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to the lots in them, which could not be divested by the surrendering and cancellation of that deed, and a conveyance of the property to Forsythe.

A surrendering and canceling of a lease for a term of years, is not good within the statute of frauds, unless it be by deed or note in writing, signed by the party. *Harrison v. Owen*, 1 Ath., 520; Revised Stat. Mich., 257. Canceling and destroying a lease, by the agreement of the parties, will not operate to divest the interest of the lessee. *Rowan v. Little*, 11 Wend., 616. The same principle applies to a deed in fee simple. *Lewis v. Payne*, 8 Cowen, 71; *Jackson v. Gardner*, 8 John. 398.

The conveyance to Forsythe was clearly fraudulent and void. This is shown by the time and the circumstances which attended that conveyance. The surrender of the deed of Franks by the Beals, is a fact which gives a strong presumption of fraud to the transaction; and when to this is added the facts that this bill was then pending, the judgment having been previously obtained, the embarrassment of the Beals, and the admitted fact that this was the only property of the defendants Beals which could be reached by execution, would seem to leave no doubt that the conveyance was made to prevent the satisfaction of the judgment.

In the case of *Harrison v. Southgate*, 1 Ath., 538, where a conveyance of land for the nominal consideration of £4,500, only £100 being paid down, and the bond of the purchaser given for the balance, without mortgage or other security, was held by Lord Hardwicke as merely colorable and fraudulent.

By his demurrer, Welles admits that he has taken the effects of the Beals from the judgment debtors, as alleged in the bill. From the filing of the bill, a specific lien attached to these effects; and in the hands of Welles, they must be considered subject to the complainant's demand. 3 Paige, 568, 366; 4 Paige, 42 and 43; and 5 John. Ch. Rep. 280.

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The double aspect of the bill is not objectionable; and the issuing of a second and third execution does not operate against the right of the complainant to file it. *Storm v. Badger*, 8 Paige, 120; *Clark v. Davis*, Harrington's Rep. 234-5.

The averments in relation to the return of the executions, are sufficient to sustain the bill. It is not necessary to aver that the marshal searched for property. He returns that he could find no property, under his official sanction; and that is all that the law requires.

Before the return day, the execution was returned; but the bill was not filed until after that day; and this is sufficient. Revised Statutes, 481, sec. 8; 8 Paige, 470. An objection is made to the regularity of the judgment; but this can only be decided by a court of law. It is not the province of a court of chancery on a creditor's bill, to correct the errors of a legal procedure. In *Shottenkink v. Wheeler*, 2 John. Ch. Rep., 279 and 280, Chancellor Kent says, "that a court of chancery has no jurisdiction over the question of irregularity in a judgment at law." A court of law grants relief on terms which a court of equity cannot impose.

On the hearing, it is proper to produce in evidence the record of the judgments and executions set forth in the bill. A part of the bill may be taken as confessed, and a final decree entered. 8 Paige, 593-4.

Upon the whole, the demurrer of the defendant Welles to the bill, is overruled, and the sale of the property is ordered in satisfaction of the judgment.

THOMAS W. OLCOTT v. AUSTIN E. WING.

A partnership in purchasing and selling lands, is governed by the same principles as ordinary partnerships.

The complainant and defendant entered into a partnership to buy and sell lands, the complainant to furnish the capital, the defendant to buy; and after the close of

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the business, the money paid by complainant, and the interest thereon, to be first paid out of the proceeds, and the residue to be divided as profits.

If a loss should be incurred, they were to bear it equally.

Under this contract a large tract of land was purchased. The land deteriorated in value; it was conveyed to the complainant, but on a bill, the court ordered the land to be sold, the loss to be borne equally by the parties.

Mr. *Backus* for complainant.

Messrs. *Jay* and *Porter* for defendant.

OPINION OF THE COURT.

It appears from the facts in this case, that the complainant and defendant entered into an agreement to purchase real estate, the complainant to advance the money, and each to share equally in the profits, after deducting the price paid, and interest. In the month of March, 1836, the defendant purchased a tract of land, described in the bill, for \$4,250; the title for which was taken in the name of the defendant, although he drew a draft on the complainant for that sum, which was paid by him. This purchase was made in pursuance of the agreement. The partnership was limited to five years, at the expiration of which time the business was to be closed. And it was fairly within the terms of the contract, that the sales of real estate purchased should be made when a good profit could be realized, or other circumstances rendered a sale proper. The above tract, however, remained on hand, and greatly deteriorated in value, with the general fall in the value of real property in the country at the time.

The complainant alleges that he repeatedly urged the sale of the premises. At length, in April, 1839, the defendant conveyed the premises to the complainant; and the question is, whether such a conveyance shall discharge him from the obligations of his partnership.

Under the circumstances, we think it was proper to ask the aid of a court of chancery to adjust this matter. With the consent of both parties, the premises might have been sold,

and the amount of the sale being compared with the purchase money and interest, would show the profit or loss. But without such consent, the only regular and safe course for the complainant to take, was to file a bill, and ask for a sale of the land, under the direction of a court of chancery.

No difficulty is perceived in giving a construction to this contract of partnership. The complainant was to furnish the capital, and the defendant was to perform the labor; and they were to participate equally in the profits. But little labor was required from the defendant in making the purchases contemplated. Where persons agree to enter into a partnership in selling goods which require continual labor and responsibility, the capital to be advanced by one, and the labor to be performed by the other, the use of the capital is generally considered as an offset to the labor. But this principle does not apply to the case under consideration, where very little labor is necessary. In the estimation of the defendant, at least, a large profit from the operation was anticipated; and that appears to have induced the complainant to advance his money.

The court will decree a sale of the premises, the master giving notice, etc., and time, as specified in the decree. And if the sale shall fall below the money, with interest, advanced by the complainant, the difference constitutes the loss, which shall be equally divided between them. Any actual expense incurred by the defendant in purchasing the land, to be allowed to him. If the land shall sell for more than the purchase money and interest, and the actual expense of the defendant, on the sale, the excess shall be equally divided between the parties, as profit.

LANMON ET AL. V. CLARK.

The general chancery powers of a court of the United States, are derived under the laws of the United States, and not under the laws of a State.

But where a new remedy is authorized by a State, which may be appropriate to the exercise of a chancery jurisdiction, this court will give relief in the mode provided.

On this ground, a creditor's bill will be sustained to reach all the rights and credits which a judgment debtor may have, although they can not be reached by execution.

And fraudulent conveyances, for this purpose will be set aside.

Mr. Fraser for complainant.

Messrs. Vandylke and Harrington for defendant.

OPINION OF THE COURT.

THIS is a creditor's bill, which states that a judgment was obtained in the Circuit Court of the United States in this district, by the complainant, against the defendant; and an execution being issued on the judgment, was returned by the marshal, no property, real or personal, to be found. And the complainant alleges that the defendant has equitable interests, things in action, and other property, which can not be reached by execution; and that he has also debts due to him from persons unknown, etc. They therefore ask a discovery, etc., and relief.

The defendant demurs to so much of the bill as seeks discovery and relief, touching the equitable interests and rights of the defendant, and to any other part of the bill which prays that the judgment may be satisfied out of them.

The creditor's bill is authorized by a statute of this State. No State court can increase or diminish the jurisdiction of the courts of the United States, sitting in chancery. They derive their jurisdiction in this respect under the acts of Congress, and it is exercised in the same manner in the States, whether the courts of those States have courts of chancery or not. But where a new mode of procedure is authorized by a State,

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which is appropriate to chancery powers, relief will be given, in the mode provided, by the courts of the United States. On this principle, this Court will sustain a bill, under the creditor's act of this State, which shall reach every description of interest that the defendant may have, and which can not be effected by an execution.

This jurisdiction is appropriate to chancery, and may be exercised where there is no special statute. Similar relief is given in England. 1 Vernon, 398; 1 P. Williams, 445; 2 Dickens, 575; Ambler, 79, 455; 20 John. 563; 2 John. Oh. 288, 296; 4 Ib. 671.

But these statutes in behalf of creditors adopt regulations which facilitate the progress of a cause, and the attainment of equitable relief. It is, therefore, judicious for the courts of the United States to avail themselves of these provisions, which conduce to the attainment of justice.

The demurrer is overruled, and the defendant is required to answer.

BRONSON AND WARD v. CAHILL.

Chancery will decree a specific execution of a contract, equally in behalf of the vendor as in behalf of the vendee.

But to carry into effect a contract, there must be mutuality.

Where only a part of the vendors were bound for a title, there is a want of mutuality, and a specific execution will not be decreed.

A deed of general warranty may be good, although it may not contain, technically, the five covenants, which such an instrument usually contains.

A reasonable time only, can be allowed to a vendor to execute his part of the contract.

Mr. *Bates* for complainants.

Mr. *Stevens* for respondents.

OPINION OF THE COURT.

THIS is a bill for the specific execution of a contract by the vendor. It states that Bronson made an agreement for

himself, and as agent for Ward, and by virtue of authority derived from him, to sell to the defendant one hundred and fifty acres of land in Michigan, which is particularly described, for the consideration of eight hundred dollars. And the bill avers that the land is still worth that sum. This agreement was made on the 11th day of June, 1840. That Bronson returned to New York, the place of his residence, and also the residence of Ward, and that about the 28th of July executed a deed, which was acknowledged on the 11th of August ensuing. On the 26th of July, of the same year, they prepared a bond and mortgage on the land, to secure the purchase money. On the 24th of August they inclosed the deed, bond and mortgage, to one Walter Clark, of Michigan, which was delivered to H. H. Comstock, then in New York, but a resident of Michigan, and which was to be delivered to said Clark, on his return, which he promised to do. But the package was not delivered. On the 22d of November, 1840, Walter Clark, as agent of the complainant, tendered the deed, and required the bond and mortgage to be executed.

To this bill the defendant filed a general demurrer.

The demurrer admits the facts stated in the bill, and on those facts the question raised must be determined.

That a court of chancery will decree a specific execution of a contract in behalf of the vendor as well as in behalf of the purchaser, will not be questioned. But it must appear, to authorize such a decree, that the contract has been fair, mutual, and that he has offered to convey at least within a reasonable time. On the demurrer the defendant can not rely on any change in the value of the property, or hardship against the fulfillment of the contract. He can set up nothing that does not appear upon the face of the bill, which is only the lapse of time for a few months, which the complainants allege is reasonably accounted for and covered by an averment in the bill that the land had not deteriorated in value. Under these circumstances, the court will overrule the demur-

rer, and require the defendant to answer. In this mode we can better reach the equity of the case.

An answer being filed, the cause came again before the court.

It is objected, that there was no mutuality in the contract of purchase, as Bronson did not name his partner, Ward. On reading the agreement, it is obvious that the defendant must have considered himself as dealing only with Bronson, and that he was the sole owner of the land. There is no allegation in the bill, that the interest of Ward in the premises was made known to the defendant. There was nothing on the face of the agreement which could give the defendant a claim against Ward, for his interest in the land. There was then a want of mutuality in the contract, and this is essential to a decree for a specific execution of the contract. *Benedict v. Lynch*, 1 John. Ch. 370; *Parkhurst v. Van Cortland*, 2 Ibid, 282; *German v. Marchir*, 6 Paige, 288.

By the agreement, a warranty deed was to be given; and it is objected that this deed does not come strictly within that description.

The old doctrine of warranty, lineally and collaterally, having in a great degree grown out of use, the inquiry may be made, what is the import of the terms warranty deed? Chancellor Kent, 4 Com. 471, says that "the usual covenants in a deed are five. 1. That the grantor is lawfully seised; 2. That he has good right to convey; 3. That the land is free from incumbrance; 4. That the grantee shall quietly enjoy; 5. That the grantor will warrant and defend the title against all lawful claims." And it is argued that the deed tendered contains but one of these covenants—"that of quiet enjoyment"—the least valuable of all those enumerated, because it is not broken until there is an actual eviction. There may be an outstanding title; there may be a cloud of incumbrances, which would prevent the sale of the land, and yet be no breach of the covenant. The same objection applies to a covenant of

warranty. In either case, an actual ouster or eviction is necessary to constitute a breach.

We are not prepared to say that a contract to convey by a general warranty deed would not be good, if any one of the covenants named by Chancellor Kent should be omitted.

It is also objected, that the deed tendered is not properly executed and acknowledged. A deed to be recorded in Michigan, when executed in a foreign state or territory, must have attached to it the certificate of the proper county clerk, that it is executed according to the laws of such state or territory. To this deed no such certificate is attached. Law of Michigan, 1840, p. 166, sec. 2.

There is another objection to the deed, that the acknowledgment of the wife of Bronson was not strictly in accordance with the requirements of the statute.

The 4th section provides that the certificate of acknowledgment must state that the wife acknowledged that she executed the deed without fear or compulsion of her husband, *or any one else*. The latter words are omitted in the acknowledgment.

It is a well settled principle that a married woman can make a valid conveyance only, in the mode required by statute. The words omitted can not be considered as surplusage. They are the words used in the statute, and we can readily see that they were intended to secure, by great caution, the voluntary action of a feme covert, in relinquishing her right to real estate. And it is not for the court to say that the legislature have made an unnecessary provision. Upon the whole, we think that the complainants are not entitled to a specific execution of the contract. And in coming to this conclusion, we rely chiefly on the fact, that there was a want of mutuality in the contract, which the complainants ask the court to carry into effect.

The bill must be dismissed, at the costs of the complainant.

UNITED STATES v. NICHOLS.

An intentional omission to place a part of his property on a schedule, in an application under the bankrupt act, which he swears to, as containing a true account of all his effects, is perjury, under the act of Congress.

A deputy clerk, being authorized to act, the same as the principal, has a right to administer oaths in bankruptcy.

Such oaths are presumed to be administered in the presence of the court, and by virtue of its authority.

The act of 1825, in relation to perjury, being a general law, applies to all subsequent cases which come within it.

Mr. *Bates*, District Attorney, for plaintiff.

Mr. *Vandyke* for defendant.

OPINION OF THE COURT.

There is an indictment for perjury, under the 1st and 7th sections of the bankrupt law. The act of Congress, Gordon's Digest, 737, makes false swearing perjury.

The indictment charges that the defendant, in applying for the benefit of the bankrupt law, in the schedule attached to his petition, did not state all his property, as the law requires.

That he had a right, or credit, against one King, of one hundred dollars, which was not returned.

That a debt due from Benjamin King of two hundred dollars, was not included.

That he had other rights and credits against King, which were not placed upon the schedule.

The defendant's counsel filed a demurrer to the indictment, for "the reason that the act of 1825 does not govern cases of false swearing under acts passed subsequent to that act; and that the petition was sworn to before a deputy clerk, George G. Bull, who was not authorized to administer the oath.

The act of 1825 is an act defining the crime of perjury generally; and it is not confined in its operations to acts passed anterior to that time, but is applicable to false swearing under the bankrupt law, as well as in other cases.

The bankrupt law must be construed with the act of 1825, as in *pari materia*. Under the proceedings in bankruptcy, the false swearing charged must be considered as having been done in court. The bankrupt court was always open. Swearing to the petition was a proceeding in court, within the law, and if false, subjects the petitioner to punishment as for perjury. An affidavit to hold to bail, is a proceeding in court, if the oath be administered in the presence of the court, or under its requirements. 7 Term Rep. 315; 2 Chitt. Cr. Law, 312; Roscoe's Cr. Ev. 758.

But it is contended that the deputy clerk had no authority to administer the oath. This position is laid down too broadly. Admit that Ball, as deputy clerk, had no authority to swear the defendant to the truth of his petition; yet it will scarcely be contended that he had not the power to do so in the presence of the court, and by its express order.

There is another view of this case which is equally conclusive. The bankrupt court ordered on the 16th of January, 1843, that "during the absence of the clerk, his deputy may receive and file petitions, administer the oath to petitioners, and perform all the duties required of the clerk of this court."

The word deputy, here, is used as descriptive. The power to act is derived from the court. We think that the power to administer the oath to the petitioner was undoubted; and also that the perjury is well assigned, if proved by the evidence.

The demurrer is overruled.

At the same term, on the traverse of the indictment, the defendant was acquitted by the jury.

HILLIARD v. BREVOORT.

A want of an averment of citizenship if not made in a bill or declaration, or where it is falsely alleged, it should be taken advantage of by pleading.

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Unless such an averment be contradicted, it need not be proved on the trial or hearing.

Where the exception is taken, the court will permit an amendment.

Messrs. *Barstow* and *Lockwood* for the plaintiff.

Messrs *Vandyke* and *Harrington* for the defendant.

OPINION OF THE COURT.

THIS is a bill in chancery, to which a demurrer is filed, on the ground that there is no positive averment in the bill that the plaintiff is a citizen of the State of Ohio.

The averment of citizenship, it is contended, must be clear and positive, as on that depends the jurisdiction of the court. 6 Wheat. 119. If this averment be doubtful, it can not be held sufficient. If the averment be a mere residence, and not a citizenship, it will not be within the law. But this averment need never be proved, unless it be denied in the plea and answer. If the citizenship be improperly or falsely alleged, the defendant must reply to it if he wish to controvert the fact averred.

At one time, it was held by a circuit court of the United States that the fact of citizenship must be proved on the general issue, but this has long since been overruled, and the law is now settled as above stated.

The court will permit an amendment, as a matter of course, of a defect of the kind alleged; but in the present bill, we think the averment is certain, and within the law.

The demurrer is overruled.

CHARLES H. CARROLL v. PERRY ET AL.

Lands purchased of the United States and paid for, though not patented, may be taxed by a State.

Property of every description, under the jurisdiction of a State, is subject to taxation.

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On the exercise of this power, the federal government can interpose no restriction. Stock of the United States is not taxable, as to tax it would be a tax on the means of the government.

The judiciary of the federal government can not, it would seem, exercise a revisory jurisdiction over the State officers, in the performance of their duty.

But, if their acts be illegal, there is a remedy in the courts of the Union, as well as in courts of the State.

The judiciary, in the investigation of tax titles, can always exercise the necessary power to procure the records of the State, or certified copies therefrom, to show the proceedings in the sale of land for taxes.

Mr. *Romeyn* for complainants.

Messrs. *Wing, McClelland* and *Backus* for defendants.

OPINION OF THE COURT.

THIS is an application for an injunction, to restrain the treasurer of the county of Monroe, in this state, from granting deeds or other conveyances of the real estate and premises described in the bill, belonging to the complainant, sold by the defendant, Perry, as treasurer of said county, for the taxes of the year 1887, on the ground—

1st. That the fee simple in the lands described in the bill was, at the time of the assessment of said taxes, for the year 1887, in the United States, and not subject to taxation.

2d. That the proceedings of the respective officers making said assessment were irregular, defective, oppressive and void.

3d. That the said treasurer denied to the complainant's agent and attorney, access to the books and proceedings of said officers, showing the manner in which the assessments were made.

It is admitted, as insisted on by the complainant, that courts of equity will, in many cases, exercise a concurrent jurisdiction with courts of law; although such courts may adopt equitable principles. 8 Wheat. 681; 2 Swanston, 580; 16 Peters, 282; 5 Peters' Con. Rep. 759, 752.

A court of chancery has jurisdiction to set aside a conveyance which is a cloud upon the complainant's title; and may

also interpose to prevent the giving of a conveyance, under the pretense of right, which would operate to embarrass the title to real estate. 5 Paige, 501; 2 Ibid, 289; 2 Story's Eq. 8 to 17; 17 Ver. 248. And the principle is also admitted, that chancery may interpose by injunction to prevent an irremediable injury to real estate. This does not mean a mischief which shall destroy its value; but one which shall materially affect its value or use, and which, when done, can not be repaired by an action for damages. 3 Ohio Reports, *Burnet v. The Corporation of Cincinnati*, 87; 17 Ver. 110; 6 John, Ch. 497; 6 Paige's Rep. 88.

But what is the ground on which this application for an injunction is founded?

It is assumed, that at the time the land was assessed for taxation, the fee was in the United States, and that, consequently, it was not liable to taxation. This position can not be admitted. It imposes a limitation on State power, which does not come within the delegated powers of the Federal Government. In the admission of several of the western States into the Union, a compact was entered into, that the lands sold by the United States, within such States, should not be taxed until after the expiration of five years from the time of the sale. But no such compact is applicable to the case before us. The question arises on the point, whether a State has power to tax land, after it has been purchased and paid for by its citizens, before the emanation of the patent from the General Government.

To say that this has been done by perhaps all the western States, in which such lands have been situated, would not be conclusive, but it would afford strong evidence of what the law is. The taxing power of a State may reach everything within a State, which can be denominated property. It may be made to embrace all equitable credits, of whatever description they may be. No State, however, can tax the stock of

the United States, held by its citizens, as that would tax the means of the General Government.

In the Virginia military lands in Ohio, lying between the Scioto and Little Miami rivers, the State has uniformly taxed entries and surveys, before the patent was issued. And the same thing has been done of lands purchased under the acts of Congress.

The act of Michigan authorizes a tax on land not patented, where it has been entered and paid for. As evidence of this, the land offices were required to be examined, and a list made, by the assessor, of land sold. The language of the act is general, and embraces such land. In law, land purchased and paid for, is considered as real estate, and descends to the heirs, and not to the executors and administrators.

The principle contended for by the complainant, would materially affect the revenue of the State of Michigan. From the large amount of land sales, the patents are some years behind the sales; and if the land sold, could not be taxed until the title issued, it would postpone a considerable portion of the revenue of the State, while the owner of the land is in possession of it, and exercising his rights over it.

There is also an insuperable objection to the revision by this court, in this form, of the irregularities of the State officers complained of. If the State had no jurisdiction, as in the case of *The Bank of the United States v. Osborn*, 9 Wheaton, 738, this court might interpose. But in this case the court think the right of the State to tax the land is clear, and the question is, whether in such a case the federal courts can interpose and arrest the proceedings of the State officers in imposing and collecting its revenue. To say the least, such an interposition would be very embarrassing to State action, in a matter vital to its prosperity. But, in addition to this consideration, there is no imperious necessity which calls for such interference. If the law shall be disre-

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garded, in divesting the title of the complainant, the conveyance will be held inoperative by the State as well as the federal tribunals. The question has been well settled, that to convey a good title under a tax sale, the law must be complied with, in all its essential requisites. This, then, will give an adequate remedy to the complainant, should the irregularities stated, have occurred, or be likely to occur.

And as to the third ground taken, "that the treasurer refused to permit an inspection of the books, to ascertain how the assessments had been made," whenever it shall become necessary to investigate such procedure judicially, means will be afforded to bring before the court all the evidence material in the case.

Upon the whole, the bill is dismissed at the costs of the complainant.

JAMES L. LYELL v. DANIEL GOODWIN.

The mode of redress for a person privileged from arrest, when arrested, is by motion to the court from which the process was issued.

A judge, privileged from arrest, when about to set out on his circuit, is not liable to be served with process of summons.

Mr. *McReynolds* appeared for plaintiff.

Mr. *Fraser* for defendant.

OPINION OF JUDGE WILKINS.

A writ of summons having been issued out of this Court, and served upon the defendant, the present motion is made by the defendant "That the writ, and the service thereof, and all proceedings thereon, be set aside, quashed and vacated."

The defendant sets forth in his affidavit upon which this motion is founded, the following facts, which are not contested:

"That he is now, and for some time has been, one of the

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Justices of the Supreme Court of this State. That a regular term of said court was, under the provisions of the laws of the State, commenced and held at the city of Detroit, on the first Tuesday of January last past, and which term did not expire until the 27th of March ensuing. That he, the defendant, as one of the Justices of the said court, was in attendance upon the said court during and throughout the said term. That the court was in actual session on the 7th of March last, and was adjourned from that day until the 11th of the same month. That on the 20th day of the same month, the Deputy Marshal of the United States for this district, came into the room assigned by the State authorities to the Justices of the Supreme Court, and where the sessions of the said court are held; and while the defendant and two other Justices of said court were actually engaged in the performance of judicial duties, and served upon the defendant, a writ from this court, commanding the marshal of the district to *summon* the defendant to appear before this court on the first Monday of April ensuing, (which was the 7th day of April,) to answer unto the plaintiff in this cause, in a plea of trespass on the case, etc., etc. On the day the said writ bears date viz: the 8th day of March, the defendant was employed in the discharge of his official duties."

By the provision of the State law prescribing the duties of the Justices of the Supreme Court of the State of Michigan, the defendant is the presiding judge of the first judicial circuit of said State. The said circuit comprises the counties of Wayne, Monroe, Macomb, St. Clair, Mackinac and Chippewa; in which counties (excepting the counties of Mackinac and Chippewa,) circuit courts are required to be held twice a year by the said presiding judge; the Spring term of the Macomb circuit required by law to be held at Mt. Clemens on the first Tuesday of April (which this year was the *first* day of April) and for the county of Monroe, at the city of Monroe, on the 2d Tuesday of April ensuing, which was the

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8th day of April, the day subsequent to the return day of the writ. The city of Monroe is forty miles from Detroit, the present residence of the defendant; and the defendant states in his affidavit, which was made on the 26th of March last, that it was his duty, and he would proceed to the city of Monroe on the 7th of April (the day when he was summoned to appear in this court) to commence and hold the Monroe circuit.

It appears then, that the writ of summons in this cause was issued on the 8th of March last, served on the 10th, and made returnable on the first Monday, which was the 7th day of April. And it further appears that the Supreme Court of the State was in session from the first Tuesday of January until the 28th day of March; and that the Macomb circuit, as required by law, was commenced and held on the Tuesday following the adjournment of the court; and that the Monroe circuit, held at the city of Monroe, forty miles from the city of Detroit, the residence of the defendant, was commenced and held by him on the 8th of April, the day after the *return day of the summons* from this court, and continued till the commencement of the St. Clair term, on the fourth Tuesday of April.

Such are the facts, unquestioned by the plaintiff, and such the provisions of the State laws, regulating the circuit courts of the State, which are courts of record, of general jurisdiction, civil and criminal, and conferring upon and demanding of the circuit judge the exercise of high judicial powers in vacation.

From these circumstances, two points necessarily arise in the case, the defendant having in his motion preferred the claim of privilege.

1st. The regularity of the writ of summons by the marshal, and

2d. To what extent the privilege exempts a Justice of the Supreme Court of the State during its existence.

1st. It being conceded by the plaintiff that the defendant

was, and is a justice of the Supreme Court of the State, and that this writ *was served* upon him while engaged in the discharge of his judicial duties, *and during his actual attendance upon the court*, the service must of course be set aside as irregular. The privilege protecting the defendant while engaged in judicial duty, as well from the service of a summons as from arrest, for, although by the service of a summons, the trouble of entering special bail is avoided, yet the summons as well as the *capias* obliges the defendant to attend the court from which it issues, and exposes the public service to inconvenience and interruption, to prevent which, the protection of privilege in all cases, whether that of Parliament, or of jurors, witnesses or suitors, was created by the common law. The privilege is not the privilege of the individual, but of the Public, and is granted to guard the legislation of the country and the administration of justice, and it is the duty of courts to give this privilege their constant protection.

But, 2ndly. The privilege to the presiding officer of a court, without whose attendance the court can not be held, is as extensive as to a suitor or witness or juror of the court; and if public policy, which is the reason of the rule, thus protects these officers and parties, with stronger reason should the rule be applied to those public functionaries composing the highest judicial tribunal of the State. This privilege of the court protects jurors, parties and witnesses from the service of civil process *eundo, morando, et redeundo*, and comprehends protection from arrest by *capias*, as well as the service of a summons. In other words, the privilege *protects them from suit*, while necessarily going to, staying at, or returning from the court; private right being suspended in favor of the public good during the period thus comprehended.

Such was the well established principle of the common law of England upon this subject, before the statute of 12th and 13th William III., C. 3. For, antecedent to this statute, members of Parliament were not only privileged from arrest,

but also from being served with any process out of the courts of law, not only during the sitting of the Parliament, but also during the recess, within the time of privilege, which was ever liberally construed a reasonable time, *eundo et redeundo*. It was not within the design of this statute to abridge the common law privilege, which was enjoyed during the sitting of Parliament; but to authorize the commencement of suit, a certain time after the dissolution or prorogation of Parliament. The statute directs the *manner* of bringing the action, viz: by summons or distress infinite to compel a common appearance, but not until after the rising of Parliament; and provides—what may be a just construction of the rule in this country—“that the plaintiff is not to be barred by the statute of limitations” in the time consumed by the privilege, but is at liberty to proceed *de novo* after the cessation of privilege, which, being a public right, enjoyed for the benefit of the public, only so far interferes with private right as to secure the public good, on the termination of which the private right re-commences, unimpaired by the time of privilege, the statute of limitations ceasing to run when privilege commenced. By this statute, as well as by the common law, which it slightly modified, during the session of Parliament *a suit could not be instituted*; and if it had been commenced before, it could not be prosecuted during the session. *Under the provisions of the statute*, the courts authorized an original to be filed against a member of Parliament, in order to prevent him from taking advantage of the statute of limitations, but no process could be issued upon it; and before this statute, this could not have been done at any time after the rising of Parliament, during the continuance of privilege. In Col. Pitt's case, 2 Strange, 987, which occurred during the reign of George II, and to which the statute of William applied, and who was arrested two days after the dissolution of the Parliament of which he was a member, and before he had time to settle his private affairs in order to return home, it was

held, upon the third point made in that case, that he should be discharged from the suit upon motion, the institution of the suit within the time of privilege being a breach of the privilege of Parliament. All the judges were of opinion that he should be discharged on motion, except two—the Chief Baron at first intimating a doubt, but subsequently ordering the entry of common bail to be stricken out, and the party discharged. And the principal question was, whether he should be discharged on common bail, or discharged altogether? It being after the dissolution of Parliament, the plaintiff had a right to commence a suit under the statute, and therefore there was a doubt whether he should not be discharged from the arrest, on common bail, and the proceedings against him continued. But the judges held that they would not countenance the infraction of the privilege, and therefore discharged him entirely. Mr. Justice Blackstone, who published his Commentaries in 1765, *after this decision*, observes, “neither can any member of either house be arrested, or taken into custody, or served with *any process*, without a breach of the privilege of Parliament.” So that the law, as it stood in England before the statute of William III, or since, extended the privilege to an *exemption from arrest*, or the *service of civil process*, during the time covered by the privilege.

In a recent case in the Queen’s Bench—that of *Cassidy v. Stewart*, which fully adopts the ruling in Col. Pitt’s case, 40 Eng. Com. Law Rep. 464—it was held, that a *ca. sa.* issued against a member of Parliament, although with a direction to be returned *non est inventus*, and with the *avowed object of continuing the proceedings of the original suit*, and *not to molest* the defendant with an arrest, was irregular, and that the proceeding should be set aside. Bosanquet, Justice, observing, “Formerly [before the statute of 12 and 13 William III, ch. 8.] the privilege was *EXEMPTION FROM KING SUED*. Exemption from arrest is recognized in various acts of Parliament. The arrest, therefore, would be an illegal act. But

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if the thing ordered to be done be illegal, the order must also be illegal. But the writ commands the sheriff to do an act, which act, if done by the officer, in obedience to the writ, would be a violation of the privilege, and would throw upon the defendant the trouble and expense of obtaining that discharge to which his privilege entitles him." The same reasoning applies with equal force to a writ of summons issued during the existence of the privilege under the common law. For the latter writ commands an officer of the court to do *an illegal act*, namely, A BREACH OF PRIVILEGE, and where the privilege is exemption from the service of a summons as well as from an arrest, the order to infract it, is *as irregular as the obedience of the order itself* in the actual service.

The doctrine of privilege is not peculiar to the common law of England, nor does it spring from the peculiar system of kings, lords and commons. It is as ancient as Edward the Confessor, and is consistent with, nay, necessary to the universal equality established in a Republic. It is inseparably connected with the fundamental maxim in all free governments, that where the public exigency renders it necessary, for common preservation, private right shall yield to public good. It has been recognized and adopted in its fullest extent in the courts of the United States, and in several of the States of this Union.

In Hunt's case, decided in the circuit court of the United States for the district of Pennsylvania, judges Washington and Peters both held, that the privilege protected a witness at his lodgings while under subpoena, *and directed his discharge*. The motion was made for his discharge from arrest under a *ca. sa.*, the judgment having been rendered before he was subpoenaed as a witness—4 Dall. 388.

In *Gerger's Lessee v. Irwin*, 4 Dall. 107, decided in 1790, the court held, that the privilege extended to arrest, *summons*, *citation*, or other civil process, during the necessary attendance to the public business.

In *Hays v. Shields*, a suitor was privileged from being sued by summons while attending to his cause in court, and *cundo et redeundo*. In this case the cause had been tried, and a day had intervened after the delivery of the verdict, when he was served with process, and the court very properly held that they would not nicely scan the time of the return of witnesses, parties, etc., etc., and that the exemption from suit, claimed by the party, was the privilege of the court, and not the privilege of the party.

The plaintiff in this cause endeavored to establish a distinction between writs of summons and *capias*; which the court held not to be solid, observing that the party's attention to his own business in court, is distracted by other objects, and he is not to be subjected to that inconvenience which would be contrary to the wise indulgence of the law. The defendant was, on motion, discharged from the action. This case occurred in 1797, in Pennsylvania. The motion was made by Ross, whose legal eminence was co-extensive with the Union in his day; and the decision pronounced by Addison, Justice, as profound a lawyer and as honest a man as ever adorned the bench of this country or of England. Were it a modern Pennsylvania decision, I should probably hesitate to give that weight to it, to which its intrinsic merits entitle it, inasmuch as it is now the common parlance of the bar to treat with levity at least, the modern decisions of both New York and Pennsylvania. But it is not merely Pennsylvania law, but the common law of England, maintained and enforced. In the argument of the counsel, and the opinion of the judge, we find cited Pitt's case from Strange, and the common law from its ancient expounders.

In *Bolton v. Martin*, 1 Dall. 296, the defendant, who was a member of the State convention in 1788, was served with a summons. Sargeant—so celebrated as a jurist and a statesman—moved to quash the process, upon his mere suggestion, as an officer of the court, that the defendant was acting in a

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public capacity, as a member of a legislative body, and was entitled to his privilege. The motion was sustained by Justice Shippen, and the defendant discharged from the action. In this case, the Attorney General of the State appeared in support of the motion, the privilege being considered a *public right*; and the whole common law doctrine of privilege was fully sustained, the court reviewing the history of privilege, and placing it on the true ground, not of exclusive favor to an individual, but of public good. And in 1803, when the supreme court of that State was filled with eminent and profound jurists, it was held (in *Miles v. McCullough*, 1st Binn. 77) that a suitor attending an appeal from the court of another county, was privileged from a summons, and discharged from the suit, on motion.

And still more recently, in 1822, in the case of the *United States v. Edme*, where a witness attending before a magistrate to give his deposition under a rule of court, was arrested on a *capias* on his return home from the magistrate's office, under a writ from the district court of the United States, in a suit for the recovery of the penalties of an official bond, the Supreme Court of Pennsylvania discharged him from the arrest, after he had given bail to the marshal, and where the application was made to the court not by the party himself, who was absent, but by his bail, the court holding that the privilege protected the witness from suit, while attending under *subpœna*, and for a reasonable time in returning home; and he was discharged *without the entry of common bail*. This case is to be found in 9th Sargeant and Rawle, 150, and is valuable, not only for the point decided, but for the eloquent exposition, by Mr. Justice Duncan, of the right of privilege, and the constitutional boundaries of the federal and State jurisdiction.

And but a few years ago, in 1836, the *district court in Philadelphia*, in the case of *Witherall v. Leitsinger*, discharged the defendant from a summons, (which is tantamount

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to the dismissal of the suit), he being a suitor in *another* county, and having come into Philadelphia to attend to the taking of a deposition in the pending suit, although the taking of the deposition had been adjourned, and he was about to return. 1st Miles, 237. Although this decision goes greater length than any prior English or American case, yet it exhibits the spirit, that courts will not be deterred from a liberal construction of the privilege of the public, by the allegation of private loss or inconvenience. Nor is the extension of the privilege, in this case, more an invasion of private right, than that in the case of *Cole v. Hawkins*, in the Court of King's Bench, Andrews, 275, where merely serving process upon a party attending to his cause in court, and while he was upon the steps leading into the court, was held a *great contempt* of court, punishable by attachment, and the court compelling the attorney, who purged himself of the contempt by declaring that he had served the writ through *mere inadvertence*, to pay the costs—and discharging the defendant. If the Philadelphia decision in 1836 is calculated to alarm, in its extension of privilege, how much more this adjudication of the Court of King's Bench, in England, in 1788—a century previous. Both cases deem the infraction of the privilege a *public wrong*, and as such, punishable by the court against whose jurisdiction the wrong was committed, and whose process was abused.

The courts of New Jersey and Connecticut have followed in the Pennsylvania path, or rather, fearlessly proclaimed the common law doctrine upon the subject of privilege, recognizing no distinction between a *capias* and a *summons*, and considering the privilege as the privilege of the court, protecting the administration of justice from interruption and delay. Such is *Halsey v. Stewart*, 1 N. J. Rep. 366, where the decision is pronounced by Justice Southard, of the supreme court of the State, recognizing and adopting the Pennsylvania decisions in *Dallas*; and *Cole and Hawkins*, in

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Andrews, 275. Such is *Harris v. Grantham*, 1 Cox's Rep. 142; and *King v. Coit*, 1 Day, 180—where it was held by the Supreme Court of Connecticut, in 1810, that the party entitled to the privilege might avail himself of it, by a plea abating the writ, which is all the present motion under consideration calls for. Though this decision is based upon a local statute, and so referred to by Judge Smith, who gave the opinion of the court, yet the language of the statute is recited in the opinion, and but repeats the common law provision, "that the party is not to be molested by suit during the sessions of, or going to, or returning from, the general court."

The court had no doubt but that the writ of error served upon the defendant, was an invasion of his privilege, as a member of the court, and that he had chosen the proper method to take advantage of his privilege, and ordered that the writ abate. Such, also, has been the character of the decisions of the Supreme Court of the late territory of Michigan, in *Woodbridge v. Cook*, decided in 1833, where the defendant was served with a summons while preparing to leave home to attend to his duties as a Judge of the Supreme Court on a distant circuit. The judgment recovered against him in a suit thus irregularly commenced, was reversed on error—and this court has repeatedly recognized the same principle in relation to members of the State Legislature, allowing the privilege when plead, and sustaining the demurrer in a suit commenced by Narr, where the privilege was set forth.

In Massachusetts the same principle has been recognized, and to the same extent. In the case of *McNeill*, 6 Mass. Rep. 245 and 264, it was decided by the Supreme Court of the State, that a snitor to an action pending in court, and during the discussion of a mere question of law by his counsel, could not be arrested on a *ca. sa.* issued on a judgment previously obtained against him in another cause; the court

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holding that his privilege protected him while "his action was discussing," and ordered him to be discharged.

In all the States of the Union, where the question has arisen, the doctrine of the common law has been fully maintained, unless altered and modified by local statute. In New York, a cursory examination of their reports would lead to a contrary impression: but I find that the principle is fully recognized.

In the case of *Livingston*, in 8 John. 350, the Supreme Court declined interference with an inferior tribunal by mandamus, commanding the court of common pleas of a county to proceed in a case against the judge of the court, intimating that a judge is not liable to be proceeded against, except by bill in his own court.

The case of *Secor v. Bell*, 18 John. Rep. 52, the question arose in a collateral action of debt brought against the sheriff for an escape of an attorney of the court, who had been taken in an execution at the suit of the plaintiffs; and had produced to the sheriff a writ of privilege, upon which the sheriff discharged him from custody, and returned the execution accordingly. Chief Justice Spencer decided that the sheriff had no authority to discharge the attorney, because it was not his province, as a ministerial officer of the court, to take notice of the privilege of an attorney, and that the proper mode to apply the protection of the privilege, was by motion in court to discharge him on an affidavit of the facts. And as, by the Revised Statutes of that State, counsellors, attorneys and solicitors are made liable to arrest on mesne process, and to be held to bail as other persons, the intimation of the judge, that the motion must be to discharge on common bail, depended upon the local statute of the state; Judge Spencer recognizing the common law rule by his citation of authority, and consequently the principle in *Col. Pitt's case*, which exempted jurors, and witnesses, and parties from arrest, and other civil process, and defined the proper mode to be a

motion to discharge altogether, and not the writ of privilege. lege.

It is needless to cull from the numerous authorities, other cases; sufficient have already been referred to, to establish these propositions as the common law of England, and the law in the various States of the Union.

1. The privilege extends to suitors, witnesses, jurors and officers, and consequently to the presiding officers of the courts of justice; and protects them, while in attendance upon their public duties from arrest, summons, or any other civil process.

2. When the privilege is invaded, the proper mode of redress is by motion in the court from which the process issued, to set aside the service, and discharge the party, where privilege has been invaded; or, in other words, to *abate the writ*.

Apply these principles to the case under consideration. By provision of the State law, known to the counsel of the plaintiff, who took out the writ, the Supreme Court, of which he was an attorney, met on the first Tuesday of January last. It did not rise until *Friday*, the 28th of March. By another provision of the State law, the justices of the Supreme Court are the presiding judges of certain designated circuits; the defendant, Judge Goodwin, being the presiding judge of the 1st circuit, and required by law to commence the Macomb circuit on the first Tuesday in April; affording him this year *but two legal days* from the close of the Supreme Court, to prepare for and go to that circuit, and by law also required to attend in succession the Monroe and St. Clair circuits, commencing at Monroe on the second Tuesday of April.

The writ of summons commanded the marshal to summon the defendant, Judge Goodwin, to be and appear in this court on the first Monday of April, to answer the plaintiff; and the law of the State commanded his presence, forty miles from this city, on the day after. He must necessarily obey the law of the State; and his judicial privilege—the same as

that which would protect the humblest suitor in the court—protected him from obedience to the summons.

The writ was taken out by an officer of this court, who was also a practitioner in the Supreme Court, while that court was in session, and made returnable on a day when the defendant was necessarily engaged in going to a court some forty miles distant from his residence. It was served upon the defendant on the 10th of March, while actually engaged in his official duties, and returned on the same day. Now, at what period of time from the commencement of the Supreme Court, in January, to the adjournment of the St. Clair circuit, two weeks *after* the return day of the writ, did the privilege of the judge cease to protect him from process? Certainly not the 29th and 31st of March, both of which days, according to the reasonable time allowed in Col. Pitt's case, and the case in Yeates, was little enough for preparation to go, and actual going to the Macomb circuit. And from that time onward, to the close of the St. Clair term, in the beginning of May, there was not a day in which his privilege did not clearly and fully protect him from the service of the writ; and, therefore, the service was illegal, and consequently it was an abuse of the process of *this* court, to take out a writ commanding the marshal to do an *illegal* act; an act, which from the known provisions of the State law, must be illegal within the time in which it was commanded to be done, and therefore, this writ must be quashed.

This privilege is not exclusive, but general: and is not appropriately obnoxious to condemnation, as invasive of private right. It is an ample shield, covering alike the suitor and the witness, the juror and the judge, and protecting from impediment the administration of justice between man and man. More especially is it essential, that the judicial functionary should be thus defended. For the time being, while engaged in the public service, he is divested of self and of

James L. Lyell v. Daniel Goodwin.

private concernment, and, as it were, dedicated in time and mind to the public service. Nor need there be *private* injury as a necessary consequence. There may be a time, when the privilege of these functionaries ceases,—when the special duty, that sets them apart to the public service has been performed, and their return to private life is clear and unquestioned, when the public interest no longer demands their protection, and the *private* right to their attention can commence, and they be held answerable as any other citizen.

3. In regard to the question of jurisdiction, it is unnecessary to pronounce an opinion, as that question will come up in other cases now pending, and *this* writ is quashed on the ground already considered. But, it may be well observed, that since the argument, I have directed an examination by the clerk of the cases instituted since the organization of this court, and the great majority of them state the citizenship of the parties in the original writ, and the few that omit this important allegation are of recent date. By this writ, we are not informed of the character of either plaintiff or defendant. By the affidavits on file, it appears that the defendant is a judge of the highest court in the State, and the plaintiff an inhabitant of the city of Detroit. Now, the judicial act of 1789, *limits* the jurisdiction of the courts of the United States to suits between a citizen of the State where the suit is brought, and a citizen of another State, and to cases where an alien is a party; and, to maintain a suit in the circuit court of the United States, “the jurisdiction must appear on the record.” This does not appear on the record, *as yet*, in this cause, and the presumption is, that a cause is without the jurisdiction of the court, untill the contrary appears; and, did the quashing of this writ depend *solely* upon this ground, I would enter more fully into the investigation of the question, notwithstanding the remark of Mr. Justice Taney, in 12th Pet. 64, “that the proper place for the averment in a *writ of right* is, the declaration.” Was this court asked to discharge a defend-

ant on a writ or a *capias*, where the writ did not disclose the jurisdiction, or the plaintiff's right to the process, it would not be insisted on, that the defendant must patiently await the plaintiff's pleasure to aver the jurisdiction of the court in his declaration.

The court direct the writ of summons in the above cause, and the service thereof, and all proceedings thereon, to be set aside and vacated, and the defendant discharged.

JUNE TERM, 1851.

LYELL v. GOODWIN.

A summons served by leaving a copy at the residence of a judge, privileged from arrest while in the performance of his judicial duties, or traveling to and from his court, can not claim the privilege against the service when at home and not about setting out on his judicial circuit.

Mr. *McReynolds*, for plaintiff.

Mr. *Fraser*, for defendant.

OPINION OF THE COURT.

A motion is made in this case to quash the writ on the ground that the defendant was a judge of the Supreme Court of the State, and as the summons was served on him while at his residence in Detroit, not engaged in the actual performance of his judicial duties, but, as alleged, was preparing to leave home on the same, or the next day, to meet the court in which he presided, in the county of ———, and that his departure, at the time stated, was necessary to reach the court at the commencement of the term which was fixed by law.

The case was submitted to the court on the argument which had been made before the district judge, and on the opinion which he had pronounced. Judge McLean observed, the facts in this case differ, in my judgment, substantially from those on which the judgment of my brother judge was given. I

have looked into his elaborate and learned opinion, and I am inclined to think that the service of the process, in this case, may be sustained without infringing upon the principles laid down in that one.

The process, in this case, as in the other, was a summons; and when a copy was left at the residence of the defendant, he was not actually engaged in holding court, nor was he in the act of traveling to or from court. And if, under such circumstances, a mere notice could not be served on the defendant, it would be difficult to imagine at what time such service could be legally made. The question arises under the law of Michigan, and not under the common law, unless its principles have been adopted by legislation or judicial decision.

Without entering into a discussion of the principles involved, I would state that I am inclined to sustain the service of the summons, and I would suggest to the counsel, if they desire to take the question to the Supreme Court, we will certify the point, as to the legality of the service. The court ordered the point to be certified to the Supreme Court, under the act of Congress.

Afterwards the case was settled and discontinued.

JUNE TERM, 1845.

PECKHAM & Co. v. LUCIUS LYON.

A letter of attorney which authorizes an agent to purchase a certain steam boat from A. B. and to draw bills on the principal for such amounts, and payable at such times as should be agreed upon between them, does not authorize the agent to purchase the boat from other persons.

The principal appears to have placed a special trust and confidence in A. B., as to the amount to be paid and the times of payment; and this can not be dispensed with by the agent.

The intention of the parties can not be shown different from the written power.

The agent who, contrary to the power, associates himself as one of the purchasers of the boat, is interested in the purchase, and can not be used as a witness.

Peckham & Co. v. Lucius Lyon.

A release of all claims on him, by the plaintiffs, under the special counts, does not restore his competency. As a joint purchaser he is liable for the boat, and may be made liable, if the defendant shall not be bound.

Messrs. *Joy* and *Porter*, for plaintiffs.

Mr. *Fraser*, for defendant.

OPINION OF THE COURT.

THIS is a motion for a new trial. The action was brought to recover the amount of the several bills of exchange, drawn by G. M. Mills, payable to the order of Peckham and Borden, and directed to John Almy, Esquire, attorney for Messrs. Charles H. Carroll and Lucius Lyon, amounting to six thousand dollars.

These bills were drawn under a letter of credit, of which the following is a copy:

“HEMON WALBRIDGE, Esq.—Sir: George M. Mills is hereby authorized to purchase the steamboat belonging to you and others, for such sums of money, and payable at such times, as shall be mutually agreed upon between you and him. And he is authorized to draw on me as the agent and attorney of Charles H. Carroll and Lucius Lyon, by drafts or otherwise, as said payments become due; which said drafts will be duly honored.

Yours, etc.,

J. ALMY,

Attorney for Charles H. Carroll and Lucius Lyon.

Detroit, Sept. 12, 1836.”

The declaration contained special counts against Lyon, as acceptor of the bills, and also the common counts for goods sold, money, etc.

It was proved that Almy was authorized by Carroll and the defendant to give Mills the letter of credit. That he was sent with it to Toledo, to buy a steamboat called the *Caledonia*, afterwards *Don Quixotte*. That this steamboat was, at the

time the letter was written, owned by Hemon Walbridge and others, but that Walbridge had sold his interest to plaintiffs, who were the other joint owners with Walbridge, at the time the letter was written. That Mills exhibited his letter of credit to the plaintiffs, made a trade with them for the boat, drew the drafts in payment, and gave them, with the letter of credit, to the plaintiffs, who thereupon agreed to deliver the steamboat to him. This was proved to be the steamboat he was sent to purchase. She was wrecked in going to the place of destination, and never came into possession of the defendant.

It was also proved that Mills bought the boat for the joint benefit of himself, and Carroll and Lyon. That with the assent of Carroll and Lyon, he had paid for one quarter of the boat by an exchange of his property, consisting of a house and lot at Tremoinsville, and had drawn the drafts upon which the suit is brought, for the other three-fourths of the purchase money. This was all understood by Carroll, Lyon, Almy, and Mills, and the matter was subsequently arranged between them, when the stock in the boat should be divided, after its arrival at Grand river.

A full release had been executed to Mills by the plaintiffs, of all liability to them upon the drafts, in consequence of a verdict, etc. Almy's handwriting and signature to the letter of credit were proved; and it was also proved that he had authority to give the letter, etc.

The drafts were then offered in evidence, but were objected to on the ground that Mills had exceeded his authority under the letter of credit, in this, that he had made his contract with Peckham & Borden, the plaintiffs, whereas, by the letter of credit he was only authorized to settle the terms as to price and terms of payment, with Hemon Walbridge alone. And the court sustained this objection.

The plaintiffs' counsel then offered to prove by Mills, that the letter was given with the supposition that Walbridge was

the part owner of the boat, and that the object of the letter was to buy the boat, and that the form of the letter was accidental, and that it was not the intention of the party, to limit him to contract with Walbridge, but to give him full authority to buy the boat.

To this evidence the counsel for the defendant objected, upon the ground, that no parol testimony could be given to explain this written instrument, which was unambiguous; and also upon the ground that it contradicted the written instrument. The objection was sustained by the court, and the testimony was not admitted.

The plaintiffs then offered Mills as a witness, to prove that Lyon had subsequently recognized the contract made by Mills, and had acted as the owner or part owner of the boat under the contract.

The witness was objected to, on the ground that it appeared from the testimony, he himself was one of the joint purchasers under the contract, and of course was jointly liable for the full payment of the purchase money.

The court sustained the objection, and refused to admit the witness; whereupon the plaintiffs voluntarily suffered a non-suit.

On the above rulings of the court, the motion for a new trial is made.

The bills were objected to, on three grounds.

1st. That they were not drawn in strict accordance with the letter of credit given in evidence, which letter was directed to Hemon Walbridge, Esquire, and contemplated a mutual agreement to be made between him and Mills, in reference to the boat, to authorize the drawing of the bills.

Where the words of a power are explicit and no doubt can arise on their construction, it would be a dangerous principle to establish, that a court may construe them differently, in accordance with the supposed intention of the parties. The letter of authority was not only directed to Walbridge, but it

was intended that the contract should be made with him, and not with others who had an interest in the boat. The language is "Mills is hereby authorized to purchase the steam boat belonging to you and others, for such sums of money, and payable at such times, as shall be mutually agreed upon between you and him."

Now here was evidently a confidence reposed in Walbridge exclusively, not only as to the price of the boat, but also as to the times of payment. This trust was not extended even to the partners of Walbridge. Much less can it be fairly construed to extend to any persons who might own the boat. Where the power is thus restricted, it is not for a court to say the restriction was unwise, or that the persons giving the power, authorized a thing to be done, different from the clear import of their words. Such a rule of construction would assume a power rather to make contracts than to construe them.

On the supposition that Almy was fully authorized to act in the premises, in saying that the bills should be honored, might be construed as an acceptance in advance, or an obligation to accept. But what bills did he, as the agent of Carroll and Lyon, say should be honored? They were such as to amount and times of payment, as should be mutually agreed upon between Mills and Walbridge. The letter of authority is susceptible of no other construction.

It will be observed that the special counts are not founded on the delivery of the boat, or on an express acceptance of the drafts, but an acceptance from the obligation imposed by the letter of attorney to Walbridge. Now if the drafts drawn were not the drafts contemplated by the above letter, under what pretence can it be said they were bound to accept them? Mills interposed himself as a party, not contemplated by the power. Carroll and Lyon may have agreed to this arrangement, but it was not within the power of attorney, and to that we must look exclusively, to ascertain whether Carroll

and Lyon were bound to accept the bills. If they were not so bound, then there was no acceptance, and this action can not be maintained. 5 Peters, 636; 15 Peters, 395; 2 Peters, Condens. Rep. 95; 10 John. Rep. 180; 3 Wilson Rep. 539; 6 Cowen Rep. 354; 8 Wend. 494; 9 Ib., 54, 68; 4 Cowen Rep. 645; 2 John. Rep. 48; 5 Ib. 59; 7 Ib. 393; 10 John. Rep. 180; 10 Wend. 57; 7 Wend. 315.

3. The objection is not without force, that a contract to bind the principal, should be made in his name; and in this view, if the obligation to accept the bills was binding on any one, it must have bound Almy to accept. This, however, is rather a technical ground, and it does not seem to be necessary to rely on it.

The above positions are met by the plaintiffs on the ground that the intention of the purchasers was carried out, and that is to be regarded in giving a construction to the letter of attorney. The intention of the parties can never be disregarded, but how is that intention to be ascertained? The only safe rule is, to ascertain the intention from the language used by the parties. 1 Term Rep. 703; 2 Bing. 522; Chitt. on Con. 212; 4 Maul. and Sel. 422; 6 Ib. 9, 12.

Mills was, clearly, an interested witness. He was released from liability on the special counts only, which set out the bills drawn by him. He had an interest of one-third of the boat, and was interested in sustaining the contract he made, by which he might exculpate himself from responsibility under the power.

The boat in question was unfortunately wrecked, and the contest is, who shall suffer the loss. The case turns, as before remarked, on the letter of attorney, and the acts done by Mills in the purchase and drawing of the bills.

Upon the whole, we feel ourselves bound to overrule the motion for a new trial.

SEDAM ET AL. v. WILLIAMS AND HODGES ET AL.

JUNE TERM, 1845.

When a judgment is obtained against one of two partners on a joint promise, the contract is merged in the judgment; and an action at law can not be maintained against the partners on the same ground.

Where a party has lost his remedy, through negligence at law, chancery will not aid; but where such remedy has been lost by accident, or otherwise, except by negligence, chancery will aid.

Where one partner sells to another, who binds himself to appropriate the goods on hand, to the payment of the debts of the firm, the assignee becomes a trustee to the creditors and the late partner, for the faithful performance of the trust.

It is immaterial whether the bill in form be a creditor's bill, if it contain upon its face matter for relief.

A debtor of the judgment debtor, if he agree to pay the judgment creditor, may be decreed to make the payment.

A mortgage can not be split up into different suits, on the different tracts of land mortgaged; yet if one or more of such tracts have been sold by a prior mortgage, or if the mortgagor have no title to such tracts, they may be omitted in the bill to foreclose.

Messrs. *Seaman, Douglass and Walker*, for complainants.

Messrs. *Manning, Hunt and Watson*, for defendants.

OPINION OF THE COURT.

THE bill in this case states that Williams and Hodges were partners, and that B. O. Williams purchased goods of plaintiff in his own individual name for the firm. That Williams sold out the goods to Hodges, who agreed out of the proceeds thereof, to pay the debts of B. O. Williams, contracted in the purchase of the goods, including plaintiff's debt. That Hodges gave a bond in the penalty of sixty thousand dollars, and a mortgage, to secure the payment of said debts. The bill is filed in behalf of the creditors of the late firm, to foreclose the mortgage, etc. A judgment was obtained by the complainants against B. O. Williams.

The defendants demurred to the bill, and assigned various grounds as cause of demurrer, which will be considered.

It is first alleged that the complainants can not sustain their bill on the ground of the co-partnership.

1st. Because the judgment against B. O. Williams has not taken away the legal remedy of the complainants against Hodges and Williams, as co-partners. *Sheeley v. Mandeville and Jamison*, 6 Cranch, 253.

2d. Admitting the legal remedy against Hodges to be extinguished by the judgment, the complainants are not entitled to any relief in equity against Hodges on that account. It was through their own negligence, and not any fraud on the part of Hodges, or either of the other defendants, that they lost their remedy at law against him, and equity will not give relief in such a case. *Pinny v. Martin*, 4 John. Chan. Rep. 566.

The first ground was undoubtedly sustained in the case cited from 6 Cranch. That case has not been overruled by the Supreme Court; but it would seem to be impossible to sustain it on general principles. That a judgment against one of two joint promisers, or persons equally bound to pay the debt sued for, both being sued, merges the debt, is a principle sustained generally, except in the above case. Had the note been joint and several, and the suit been commenced against one only, and a judgment obtained against him, another action might be brought against the co-promiser. But, whether the case of *Mandeville* be law or not, the bill is not objectionable on that ground.

On the second ground, it is supposed, that if the right at law against Hodges be extinguished, by the judgment against Williams, that is no ground on which chancery can give relief. It may be admitted, as ruled in the case of *Pinny v. Martin*, that where a party has lost his remedy at law by negligence, chancery will not aid him. But the remedy sought against Hodges, did not exist as against Williams. The bill seeks to foreclose the mortgage given by Hodges, and subject the property covered by it, to the payment of the debts

of the firm. This, if not a new liability, is a new security, for the payment of those debts, and it can only be applied, as intended by the parties, by a court of equity. No procedure at law against Williams and Hodges, could effectuate this object.

It is contended that the bill can not be sustained on the ground that Hodges is a trustee for the creditors of the co-partnership.

In support of this position, it is insisted, that no case can be found in which a court of equity has declared a debtor to be a trustee for his own creditors, and sought to charge him with the payment of his debts in this new character, aside from his legal liability.

Hodges, it is said, was equally bound with Williams for the payment of complainant's debt, when he purchased out Williams's interest in the co-partnership; and when he afterwards gave the bond and mortgage. That the judgment was not obtained against Williams, until nearly two years after the bond and mortgage were executed.

It is true that Hodges was equally liable with Williams, for the payment of the debts of the partnership. But by his contract with Williams, he bound himself, out of the proceeds of the goods received, to pay the debts of the firm. Does not this constitute a trust? If Hodges were about to appropriate the goods in any other manner, and for any other purpose, than to pay the debts of the partnership, could not Williams restrain him by injunction? Could not the creditors of the firm restrain him? It was upon the condition of the faithful application of the proceeds of the goods to the payment of these debts, that the goods were placed under the control of Hodges. The mortgage was given to secure the faithful performance of this contract. And those who are beneficially interested in the contract, may enforce the mortgage. *Bleeker v. Bingham*, 3 Paige's Ch. 249; 1 John. Ch. Rep. 82; 3 John. Ch. 261; 2 Story's Equity, sec. 1041 to 1044.

As the bond and mortgage were intended to secure the payment of certain moneys to the complainants and other creditors of Williams, and not directly to him, he may be considered in equity as a trustee of the bond and mortgage for the complainants and others. It was held, in the case of *Hick v. Kinmar and Phillips*, 3 Swanston, 417, that a person not a party to a contract, nor privy to it, but for whose benefit a third person had entered into it, could file a bill in equity for a specific execution of it. 7 Cranch, 69; 1 John. Ch. 129; 7 Paige, 627.

It is insisted, that the bill can not be sustained as a creditor's bill, as it does not show that the remedy at law has been exhausted. An execution on the judgment against Williams was returned no property found, as required.

As to the character of this bill, it is not material, if it embody principles which show that the complainants are entitled to relief. It is not, technically, a creditor's bill.

On the supposition that this is a creditor's bill, it is objected that it can not be sustained against the defendants Hodges and Gardner D. Williams.

And the decision of Chancellor Sanford is cited in *Donovan v. Finn*, Hop. C. Rep. 85, where he says "the court has no power to compel the debtor of a judgment debtor to make payment to the judgment creditor, in satisfaction of the judgment." And it is argued that Hodges is a debtor to B. O. Williams to the extent of the bond and mortgage, but the defendant, Gardner D. Williams, is not a debtor of B. O. Williams in any amount.

Whether a debtor of a judgment debtor can be decreed to pay the judgment creditor, must depend upon the character of the contract out of which the indebtedness arises. If the debtor bound himself to pay the judgment creditor, he would be decreed to pay him. Or if the contract to that effect were made with the judgment debtor, the principle stated in the above case will admit of qualification.

The complainants' bill is alleged to be multifarious, as it seeks to have the judgment at law satisfied out of a chose in action, the bond and mortgage; and also asks a foreclosure of the mortgage. Cooper's Equity, 182-3; *Swift v. Egford*, 6 Paige, 22; *Salbridge v. Hyde*, 1 Jacob, 151.

It is a matter of difficulty to lay down any rule by which a bill shall be considered multifarious. But, we think the present bill is not subject to this objection. The claim of the complainants and the other creditors can be satisfied out of the mortgage only, by a foreclosure and a sale of the premises.

The bill prays a foreclosure of the mortgage, except lot ninety-six and a part of lot ninety-seven; and this, it is said, is good on demurrer. A bill, it is said, must apply to the whole, and not to a part, of the mortgaged premises, because it would multiply litigation. Cooper's Equity, 184; Mitford's Pleadings, 183.

It may be that the mortgagor had no title to lot ninety-six, and a part of lot ninety-seven. It is true that a party would not be permitted to file several bills, to foreclose different parts of the same mortgage. That would be an abuse which the court would correct. In the general, such a procedure might be favorable to the mortgagor; especially if the property would be likely to sell for more than the mortgaged debt. The bill shows that the above lots have been sold under a prior mortgage.

It is objected that the bill is filed by the complainants, on behalf of themselves and all other judgment creditors of the defendant O. B. Williams, when it does not appear from the bill that there are any other judgment creditors.

And it is said to be good ground of demurrer to the whole bill, that a person who has no interest in the controversy, and has no equity as against the defendant, is improperly joined as a party complainant. *Clarkson v. De Peyster*, 3 Paige, 336; *King of Spain and others v. Machado*, 4 Russell, 225; 8 Condensed English Ch. Rep. 643.

Lawrence and Keese v. Wickware and Cobb.

This may be good law, but its application to the case is not perceived. The argument used is, "if a complainant who has an interest in a suit, can not unite with him one who has no interest; it would seem to follow that he could not file a bill in behalf of himself and others, without showing there are others interested in the subject matter of the suit."

The bill, by the general designation of judgment creditors of the firm, leaves no uncertainty as to the persons who may come in and claim a due proportion, under the sale of the premises. Where parties are very numerous, a part of the persons in interest may prosecute for the benefit of the whole. In their decree, the court will make the proper distribution of the money.

The objection that the citizenship of the defendants is not sufficiently alleged, is not sustainable. In the bill they are alleged to be residents, but in the subpoena they are stated to be citizens.

The demurrer is overruled, and the defendants are required to answer, etc.

LAWRENCE AND KEESE v. WICKWARE AND COBB.

A suit after it shall have been commenced, cannot be affected by a State law extending the exemption of the property of the defendants, such law never having been adopted by the court; and the law previously adopted authorized an exemption to a more limited extent.

Mr. *Fraser* for complainant.

Mr. *Emmons* for defendant.

OPINION OF THE COURT.

THIS is a case in chancery, in which a receiver was appointed, and the legislature of the State having passed a law exempting certain articles of property from execution, in addition to those formerly exempted, a motion is made to

extend the exemption under the recent act. But the court held, that the revised act which had been adopted by the court, and under which the present proceedings were instituted, should govern the case. The property was ordered to be sold.

BELL, ET AL. v. POMEROY.

In a bill of discovery, to aid a prosecution at law, the bill should aver the materiality of the facts, and that they can only be proved by the oath of the defendant.

It is no sufficient answer to such bill to say, that A. B. can prove the facts; where the person so referred to is interested.

The complainant cannot be compelled to rely upon the oath of an interested witness. He may require the oath of the defendant as to the facts.

There is a distinction between a bill for discovery merely, and one for discovery and relief.

The plea presented the issue, who was best acquainted with the facts of the case, the defendant or other persons? Such an issue cannot be tried.

Mr. Romeyn for complainants.

Messrs. Joy and Porter for defendant.

OPINION OF THE COURT.

THE defendant brought an action for trespass on personal property, against the complainants, on the law side of this court. In aid of the defense at law, the present bill was filed, to procure a discovery from the defendant.

In June, 1843, Bell sued out a writ of attachment from a circuit court of the State, against William Cramer, an absconding debtor, which was laid upon certain goods as being his property. The other complainants aided in the service of the attachment. Pomeroy sued them for trespass, on the ground that he had acquired title to the goods from Cramer. In their defense, the complainants set up that the goods were obtained by a fraudulent conveyance, and that others were

interested with him in the goods, who should have been made parties. And the bill avers that the facts charged are material to the defense of the complainants in said suit at law. "That a discovery by the said Pomeroy of the various matters set forth in the interrogatories to this bill is indispensable to enable the complainants to plead to said declaration, and as proof in the trial of the cause, and that they are unable to prove the facts by other testimony."

The defendant pleaded that the facts set forth in the bill of complaint are within the personal knowledge of Obed Smith, and may be proved by him. That said Smith was his agent, and that the defendant has no personal knowledge of his doings.

The materiality of the facts alleged in the bill, as a defense to the action at law, are obvious.

The non-joinder of the parties connected in interest, with the plaintiff in the original suit, are important to be known, that a plea in abatement may be pleaded. Should such a plea be filed, on insufficient grounds, the judgment would be peremptory.

In support of the plea it is contended that a discovery is granted in such a case only where there is a failure of other legal testimony in the case. That the plaintiff at law can not be called upon to disclose facts for the defense, unless he alone has knowledge of the facts, and they are such as the defendant is entitled to have before the jury on the trial. 10 Peters, 497; 2 Paige, 601; 4 John. Oh., 409; 7 Oranch, 89; Mitford, 245.

That the only fact in the bill which has any thing to do with the defense, is that other parties are interested in the goods; and this, if true, may be proved by competent witnesses. That it is a fishing bill, which the law will not tolerate. 2 Cain's Cases, 296; Story's Plead., 263-4.

This argument is in conflict with the express allegations of the bill. The complainants aver, that the facts are material in

their defense, at law, and that they can only be proved by the oath of the plaintiff. The plea is not supported by an answer, and the facts stated in the plea must be considered as true, from the manner it comes before us.

The grounds on which the discovery is asked, that the title of Pomeroy is fraudulent, and that other persons have an interest in the goods, it is contended, do not give to the complainants a right of discovery. Hare on Discovery, 197. That it is not a sufficient ground for a discovery to insist that the evidence sought will prove that Pomeroy has no title, and that the title will, therefore, devolve on the plaintiff.

There is a distinction between a bill filed for discovery merely, and a bill filed for discovery and relief. The former is ancillary to a trial at law; the latter, although a bill of discovery, withdraws the cause from a legal forum, and brings it for a decision before a court of equity. The present is merely a bill of discovery. It may be filed as a matter of right, either in aid of proof, or as a substitute for proof adducible in a court of law. Mitford's Pl., 198, 307; Hare on Discovery, 1, 110, 116; *Legget v. Poetry*, 2 Paige, 601.

The cases cited in 2 Story's Com. on Eq., sec. 1495, were cases where relief was prayed. In 1 Story, sec. 74, the rule is confined to such cases. And this was the character of the cases of *Rupel v. Clarke's Ex'rs*, in 7 Cranch, 59; and in *Brown v. Swann*, 10 Peters, 497. Judge Story, in his latest work on this subject, refers to this rule, and this will reconcile the cases. Story Eq. Pl., pp. 260, 348; note 319; sec. 324.

The plea presents as an issue, the question, who is best acquainted with the facts of the case, the defendant, or third persons? Can such an issue be tried? It involves not merely a knowledge of the facts, but the competency and credibility of witnesses. Such an issue, if it could be tried, would lead to great delay and to no practical result.

Smith is charged in the bill as having an interest in the

goods. Can he be made a witness in his own case? And under such circumstances, is it an answer to the bill that Smith has a knowledge of all the facts? He is incompetent. The complainants are not bound to waive this objection and call Smith as a witness, in their defense. It would be unsafe for them to do this. And no court could require them to do it.

Smith is also personally interested in denying the fraud. If he acted fraudulently, he is personally responsible to Pomeroy. The plea does not aver Smith to be a competent witness. Its averments are limited to what he did, and does not cover the allegations as to the title of other parties.

Pomeroy, it is contended, being in lawful possession of the goods, by his agent Smith, may maintain an action of trespass against the complainants. This position is founded on the presumption of a legal possession by Pomeroy, and that the defendants, in the action of trespass, are without title. On this bill we are not to try the title. The complainants say that Pomeroy's title was fraudulently acquired, and that they can only prove it by his oath. We think, under the circumstances, they are entitled to an answer, and the plea is consequently overruled.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—JULY TERM, 1845.

ZEBULON PARKER v. WM. HATFIELD.

When the evidence on a bill to enjoin the defendant from infringing the plaintiff's patent, be conflicting, the court will direct an issue to be tried by a jury, or refer the matter to a master, to examine the machinery of the defendant, take additional testimony and report.

A reference being made, and a favorable report for the plaintiff on all the points controverted being made, an injunction was granted.

Mr. *Ewing*, for complainant.

Mr. *Goddard*, for defendant.

OPINION OF THE COURT.

THE complainant filed his bill against the defendant, to restrain him from infringing his patent right. The complainant, in connection with his brother, now deceased, claims the invention of a new and useful improvement in the application of hydraulic power, by methods of combining percussion with re-action, applied and exemplified in the forms of machinery which they mention.

The defendant in his answer, denied the infringement, and also the right of the plaintiff as stated in his bill.

At the hearing, it was proved by two witnesses, introduced by the complainant, that the water wheel used by the defendant was the same in principle, as that claimed by the plaintiff. And one of the witnesses says that he heard the defendant say, he expected to pay Parker for his improvement.

Several of the witnesses called by the defendant, say, that the improvement claimed by the plaintiff was of no value. That the power is derived merely from the weight of the water, and that there is nothing new in the invention. Under this conflict of the testimony, the court referred the matter to C. P. Buckingham, Esquire, who was directed, at the request of either party, to witness such experiments as may be made in relation to the improvements claimed, and that he shall take such further testimony as may be requested, due notice being given. And that he report the result of his experiments and his opinion in relation to the following matters:

First—Whether the invention claimed is new or useful; and should he so find, that he state the particulars in which it is new, and wherein consists its utility.

Secondly—Whether the complainant's patent is valid; and if not, the reason of its invalidity. It may be proper here to remark that these directions were framed by the counsel, and the impropriety of this one was not noticed by the court, until the report of the master was made. The object was to have a report on all matters connected with the subject, which either party desired. But the validity of the patent, upon its face, was a matter of construction for the court.

Thirdly—Whether the invention claimed by the defendant, or the water wheel made, vended or used by him, is an infringement on complainant's rights under his patent; and if so, wherein.

Fourthly—The amount of damages, etc.

Under these directions the master reported, "the particulars in which this part of the invention is claimed to be new, are, the position of the shaft, (being horizontal) and the number of wheels attached thereto. That its utility consists in the convenience of attaching the shaft directly to the saw without the intervention of gearing; in avoiding friction by placing the wheels in pairs, so that the water shall press equally each way in a direction parallel with the shaft, and in

permitting the power of a low head, as applied to the same shaft, to be increased to the utmost extent of the supply of water, by increasing the number of pairs of wheels."

"The next particular of the invention claimed, consists of the concentric cylinders, and the manner of supporting them."

And he reports that no evidence was adduced to show that this part of the invention was not new, and he says there can be no doubt of its utility.

The next particular of the invention claimed is, "the spouts which conduct the water into the wheels from the penstock, and their spiral terminations between the cylinders." And this the master reports is both new and useful.

Another part of the invention claimed by the complainant is, a contrivance "for applying the principle of vertical or circular motion of the water to re-action wheels now in use. This, he says, is both new and useful."

He reported favorably of the patent, that the defendant had infringed it, and he estimated the damages at seventy-five dollars.

Exceptions were taken to the report, and argued, but no additional testimony was offered. As to the infringement, the master reports, "the improvements claimed by the plaintiff, in the summing up of his specifications are, 'the peculiar form of the buckets, and the double spiral scroll placed between them.' The specification itself, however, describes the wheels as placed in pairs on a horizontal shaft; and the scroll as being placed in a concave resembling an ogee. The spiral scroll, the combination of the wheels and the concave, are all of them, undoubtedly infringements on the rights of the complainant, under his patent." This is the opinion of the master, who is understood to be practically acquainted with machinery, and especially with the kind of machinery involved in this inquiry. And his opinion being formed from actual examination and experiments, it is entitled to great

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weight. Indeed, there is no evidence in the case which can create any doubt in the mind of the court, as to its entire accuracy.

The novelty of the invention has been called in question by the counsel, and a reference is made to the Dictionary of "Arts and Sciences," page 2010, under the head of "Mill;" and to other treatises on mechanics, but, we think, without success. We think the invention of the complainant is different in principle from any structure referred to. And we can not doubt, from the evidence and the models exhibited, that by the combination described, a great increase of power is gained over any other machinery before used for a similar purpose. The contrivances show great ingenuity and an intimate acquaintance with hydraulics. From the evidence, and our reflection on the subject, we are impressed with the great value of the invention, with its novelty in combination, and with the high merit of the patentees in bringing into practical operation so great an improvement in hydraulic power. We therefore enjoin the defendant from further making, using or vending re-action water wheels, to be used in the manner of those heretofore made by him, or any other infringing of the exclusive privileges of the complainant, etc., and that within twenty days the defendant pay the costs of this suit, etc.

BROOKS AND MORRIS v. BICKNELL AND JENKINS.

Under the act of 1836, the renewal of a patent does not enure to the benefit of the assignee, unless by the terms of the assignment, such benefit was secured.

A general assignment conveys only an interest during the term for which the patent was granted.

Any other construction would defeat the expressed object of the law authorizing a renewal of the patent.

Messrs. *Wright, Coffin and Miner* for plaintiffs.

Messrs. *Walker and Galloway*, for defendants.

OPINION OF THE COURT.

"A question is made whether the assignment of the patent by the original patentee, does not, on the renewal of it, enure to the benefit of the assignee."

By the 11th section of the act of 4th of July, 1836, a "patent is made assignable in law, either as to the whole interest, or any individual part thereof, etc., "which assignment is required to be recorded in the patent office, in three months from the execution thereof." The 18th section of the same act, which authorizes, on the conditions stated, a renewal of the patent, provides, that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein."

If the question turned upon these two provisions, and no reference were had to the interest assigned, and the object of the government in granting a renewal of the patent, the renewal would seem to enure to the benefit of the assignee. Such was my impression on an application for an injunction in the above case, at Chambers, as appears from the 154th page of the fourth number of the Western Law Journal, vol. i. This question, however, was not involved in the point then under consideration. The patent had been assigned in part only. The remarks were made incidental and without examination; and I am now convinced that the view, rather intimated than expressed, in its broadest sense, and without qualification, is not sustainable.

Before the act of 1836, patents were renewable only by application to Congress. But in the 18th section of the above act, the Secretary of State, the Solicitor of the Treasury, and the Commissioner of Patents, were constituted a board to grant renewals of patents on the conditions and in the mode provided. "And," the section provides, "if, upon

a hearing of the matter, it shall appear to the full and entire satisfaction of said board, having due regard to the public interest therein, that it is just and proper that the term of the patent should be extended, by reason of the patentee, without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for his time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use, it shall be the duty of the commissioners to renew and extend the patent," etc.

From this provision, it is clear, that the right of renewal is limited to the patentee, whether he retains or has sold his invention. The remuneration contemplated by the statute, as having been received "from the use and sale of the invention," embraces the case where the entire patent has been sold or assigned. Now, if the benefit of the renewal, in such a case, shall enure to the assignee, how much is the patentee benefited? The renewal was granted on his application and at his expense; and the object of the law, in authorizing a renewal, is to give to the patentee "a reasonable remuneration for his time, ingenuity and expense." It is plain, therefore, that if the assignee realize the benefit of the renewal, the object of the law is defeated, and the solemn action of the board is worse than useless. Nothing could be more inconsistent or preposterous, than the action of a board constituted of high functionaries of the government, and vested with powers to make the above inquiry, and to extend the patent, at the expense of the patentee, if all the benefit of such extension shall result to the assignee, and this, too, under the express intention of remunerating the patentee. Where the assignment of the patent is only in part, the principle is the same, the difference being in the degree of interest only.

The same section, it will be observed, which gives the ground on which the patent shall be renewed, makes the provision in behalf of the assignee: and can it be supposed that

Congress intended by this provision to defeat the intention of the renewal, so plainly expressed and provided for in the same section? No known rule of construing statutes can sustain this view; and the force of this view is not weakened by any of the considerations suggested. It may be admitted that Congress had power to prescribe any conditions which they deemed proper, on the renewal of the patent. Congress had power, unquestionably, to refuse a renewal. The inquiry is not what Congress had power to do, but what they have done.

The assignment transferred only the interest expressed on its face. No right, beyond the term named in the original patent, was conveyed by the assignment, unless so specified. But it is said that the assignee had ground to expect, when the patent expired, that he, in common with others, would have a right to use it; and that to deny him this right would be unjust. When he purchased the patent, in whole or part, he knew, or at least must be presumed to have known, that the patent could be renewed by Congress, and as a prudent man, he should have provided for such a contingency, in his contract of assignment, and what, under a renewal, would be a just provision in behalf of the assignee. For the time of the patent, he has not only had the right to use the machine, but to sell the invention to others. Now, no hardship results to the assignee from the renewal, unless he has a machine in operation which is necessarily suspended by the extension of the patent. The assignee could not claim, on any supposed ground of hardship, anything beyond the use of the machine or machines he may have in operation at the time of the renewal of the patent. But, under the construction claimed for the assignee, he not only takes the use of the machine, if the assignment was a general one, but the entire beneficial interest in the renewed patent. Such a construction is in direct opposition to the declared intention of the act.

In some cases, where the patent has been extended by act


of Congress, the right to use the machine, as in the case of Oliver Evans, was secured to purchasers; but in other cases no such right was reserved. Nothing, therefore, can be inferred favorable to the pretensions of the assignee from the special acts of Congress: and if, in every case, Congress had reserved to the assignee the right to use the thing patented, it would not sustain the claim of the assignee to the extent as now urged. There is no precedent or usage in the government, which goes to strengthen such claim. It must depend, wholly, upon the 1st section of the act of 1836; and, as has been shown, the construction contended for would go to defeat the obvious intention of the statute.

Some other interpretation of the section must be given, which shall make it consistent with itself, and effectuate the intention of the Legislature; and this can be done without difficulty. By the 18th section, "the benefit of the renewal is extended to the assignees of the patent to the extent of their interests therein." Now, where the assignment provides, that in the event of a renewal of the patent, the same interest shall be continued to the assignee, the above provision gives a legal effect to it.

As before remarked, the assignment of the patentee being general, would only transfer an interest during the patent; and if it had been special, of the same interest, should the patent be renewed, there would be no legal transfer of the renewed patent, had not such an interest been protected by the 18th section. Without this provision, the assignment might have been continued on agreement to convey; but it would not have been a legal conveyance of the patentee's right. He could not convey a legal title to that which was not in use; and from this it will be perceived that full effect is given to the assignment under the above section. This, it appears to me, is a fair construction of the statute. It harmonizes the provisions of the statute, and gives effect to the intention of the parties. The act of 1836 gives no

authority to renew a patent, except for the benefit of the patentee. Consequently, where the entire patent has been assigned, if the assignee has the full benefit of the extension, there can be no renewal. If this had been the view of Congress, they would have said so. They would have provided, that where a patent had not been assigned, it might be renewed. But they have said no such thing. The provision for renewal extends, as well to a case where the patent had been assigned, as where it had not been.

The policy of the statute is a benign one. Its design is to foster genius and reward merit. Nothing can be more notorious than the poverty of great inventors. The few exceptions that may be named, show the generality and truth of the remark. Men, whose minds are excited by the hope of discoveries, do not accumulate property. Absorbed by the highest mental operations, they naturally become indifferent to everything else. They remain poor, while their inventions add prosperity, wealth and glory, to their country. It is said that the inventor of the gas lights of London, was a pennyless wanderer on the walks of that great city, which his genius had lighted. Fulton, and many others, might be named as the greatest benefactors of the ages in which they lived, but who were almost destitute of the means of living. This was known to the Congress of 1836, and the above act was provided to deal justly, if not liberally, with inventors. In proportion to the poverty of these men, would be the necessity to sell and transfer their inventions; and this, often before their value had been fully ascertained. The act intended to provide for such cases. Some may call it a munificent act; but with much greater propriety it may be denominated an act of justice. Such, then, is the character and object of the act. Its policy is national. But, if the claims of the assignee be sustained, this policy must be disregarded and overthrown, and this to secure the rights of assignees, who may have no other merit than that which



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arises from the possession of means to purchase and speculate on the fruits of genius. It would indeed be singular, if such a motive were found in an act having in view the benefit of inventors. This would disregard the avowed intention of the act, and would sacrifice the greater to the lesser interest, and, as I think, does not necessarily follow from a full and fair construction of the act.

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A verdict on an issue at law, directed by a court of chancery, will not be set aside on the ground that it is against the weight of evidence, unless the preponderance of the evidence shall be clear.

Such an issue is not directed as a matter of form.

Where doubts exist, or testimony conflicts, or where the subject matter is fit to be examined by a jury, an issue should be directed.

Patent right cases are of this character, as they are to be decided by experts, who generally differ in opinion.

There is no infringement of a combined machine, unless all the parts which constitute the combination, are used.

Before the right under a patent is established at law, chancery will not decree an injunction, unless such right shall be clearly established.

Messrs. *Wright, Coffin* and *Minor* for the plaintiffs.

Messrs. *Walker, Galloway*, and *Kebler* for the defendants.

OPINION OF THE COURT.

THIS is a motion for a new trial of an issue at law, directed by the chancery side of this court. The complainants filed their bill, representing that they are the assignees of Woodworth's Planing Machine, etc., for the county of Hamilton and other territory; that the defendants have infringed their rights by the use of a machine, the same in principle as Woodworth's; and they pray that the defendants may be enjoined from the use of their machine. The court directed an issue at law to try the rights of the respective parties.

An issue was made up, involving the following points in regard to the validity of Woodworth's patent:

1. The renewal of the patent by the administrator of Woodworth.
2. The assignment of the patent to the plaintiffs.
3. The sufficiency of the specifications.
4. The validity of the disclaimer of the circular saws by the administrator.
5. The novelty of the invention.
6. Whether the machines are substantially the same in principle.

More than thirty witnesses were examined in the case, either orally or by written depositions, many of them being eminent for their theoretical and practical knowledge in mechanics, and in the structure of machinery in general. On all the facts submitted to the jury, the witnesses differed in opinion, rather more than half being on the side of the plaintiffs, and the others for the defendants. The cause was patiently heard by the jury, argued by counsel, and submitted to them by the court. They returned a general verdict for the defendants. And now a motion is made to set aside the verdict.

In *Store v. Mabbot*, 2 Ves. sen. 552, it is said that "courts of equity are much less strict in granting new trials than courts of law, it being necessary, not that the question should be decided to the satisfaction of others, though ever so often, but that the conscience of the court should be quite satisfied." In another case it was said, "the court will not direct a new trial of the issue, if application for a new trial rested solely upon the ground that the verdict was against the weight of evidence."

In this case, there is no objection, founded on the admission or rejection of testimony—none to the conduct of the jury, or the charge of the court. The motion for a new trial rests wholly

on the allegation that the verdict was against the weight of evidence. In an ordinary case at law, a new trial is rarely if ever granted on this ground. The jury weigh the evidence, and determine on the credibility of witnesses; and when they have thus determined, the preponderance must be striking and clear, to authorize a court to order a new trial. The conscience of a chancellor must, it is said, be satisfied: but the same may be said in a court of law. The word, conscience, here means nothing more than a sacred and legal conviction in the mind of the court, that the verdict is sustained by the evidence.

The finding of a jury is entitled to great weight, whether on an issue directed out of chancery, or in an ordinary case at law. If this were not so, why should a court of chancery direct an issue? This is not done as a mere form, but to relieve the court in a matter of doubt, or because, from the nature of the case, and the conflict of the testimony, it is fit that a jury should decide. Of this character was the case under consideration. It involved the structure of complicated machinery, the sufficiency of its description, and its identity in principle with other machines. These points could only be satisfactorily decided by the testimony of experts; and, as usual in such cases, there was great diversity of opinion among the machinists examined as witnesses. Now, such a controversy is not to be determined alone by the number of witnesses on the respective sides; but their character, knowledge, experience, and manner of statement, have great influence in the decision. Such a matter is most appropriately referred to a jury. The rule has been well settled, that in these cases an injunction will not be decreed, unless the right is clear, or has been established by an action at law.

That these same issues were submitted to a prior jury, which, after a full hearing of the evidence, were discharged by the court, because they could not agree upon a ver-

dict, is a fact which can not be entirely overlooked on this motion.

As the verdict was a general one, the court can not judicially know on what point or points it turned. If the jury found against the plaintiffs on the third, fourth, fifth, or sixth point above stated, unless otherwise instructed, their verdict would have been, generally, as rendered, for the defendants. In this aspect of the case I have had the most difficulty. For if the jury found that the defendants' machine was an improvement upon the plaintiffs', there was still an infringement, if the plaintiffs' entire machine had been used by the defendants. I say the plaintiffs' entire machine, as it was the opinion of the court that Woodworth's specifications could only be sustained for a combination of known mechanical powers. Had Woodworth's machine, as specified, been an improvement upon any other, then the use of any part of the improved machine would be an infringement. But there is no infringement of a combined machine, unless every part be used. All the witnesses called by the defendants, stated their planing irons were substantially different in their mode of being fastened and operating, from those of the plaintiffs; and Keller, one of the principal witnesses of the plaintiffs, coincided with this view, and said, "he considered that in this respect the defendants' machine was an improvement upon the plaintiffs', which entitled them to a patent. Now, if this improvement was substantially different from one of the combined parts of Woodworth's machine, though it was substituted for it, and *all the other* parts were used, still there was no violation of the plaintiffs' right. The same parts must be used in the same combination, to make the defendants liable. This I understand to be the rule as laid down in numerous cases.

Upon the whole, on a full consideration of the case as stated, and as shown by the evidence, I do not feel authorized

to grant a new trial, or set aside the verdict. There is evidence, and strong evidence, to sustain the finding of the jury. On the other side, the evidence for the plaintiffs is as strong, perhaps stronger; but the preponderance is not so clear as to enable the court to disregard the verdict. If Woodworth's specifications had been sufficient for an improved machine, and the same points had been submitted to the jury, that were submitted to them in this case, I should have ordered a new trial.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1846.

DOE, EX DEM. O'BRIEN v. WOODY.

Under the statute of Indiana, a will made and recorded in any other State, according to the laws of such State, is valid to pass lands or other property in Indiana; and a copy duly certified from such record is made evidence.

An alien in the United States before 1802, may be admitted to the rights of citizenship, without proof of having resided, etc., five years.

A judgment against executors in Indiana, does not authorize an execution against the lands of the deceased.

A sale of land on such an execution can confer no title.

Mr. Judah appeared for the plaintiff.

Mr. Bright for the defendant.

OPINION OF THE COURT.

THE lessor of the plaintiff claims the tract of land in controversy, as devisee of Thomas Jones. The patent is dated the 12th of July, 1812, and was issued to Jones. An exemplification of his will being offered in evidence, was objected to, as not being duly authenticated. Jones died in the State of Pennsylvania, and a copy of the will is offered under the act of 1824, sec. 8, which provides that "wills devising lands in this State, executed abroad, and proved according to the law of the country in which executed, and so duly certified under the seal of the court, or officers taking such proof, and the signature of the clerk of such court, and the same authenticated by the certificate of the presiding judge of such

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court, or the first judge of the county, or district, that the certificate is in due form of law, shall be sufficiently proved to admit the same to record, and be of like force as if taken within the State," etc. "And copies of the wills and testaments and codicils, proved as aforesaid, etc., and authenticated as aforesaid, shall be good and sufficient evidence of the devises or title therein contained."

It is objected that the statute requires the original will to be produced, having the authentication above specified. If the original were produced with the proofs, it might be evidence; but the statute declares a copy certified as required, shall be evidence. A copy, as in this case, from the Pennsylvania record of wills. As the will with its authentication may be recorded in this State, a copy from such record, it is presumed, would be evidence.

We think that the authentication is a substantial compliance with the act above cited. And if that law, as to the mode of proof, differs somewhat from the Indiana act on the same subject, still the above statute makes the proof valid. In regard to the proof of the will, the Pennsylvania mode is substituted for that of Indiana.

If the original will were produced, it might be necessary, as laid down in *Roberts on Wills*, 145, to prove to the jury that it was attested by the witnesses. But the statute makes the copy duly authenticated evidence, without this proof.

It is objected that Thomas Jones was an alien, and that he consequently, could not transmit land by devise. That being an alien, on office found, his land would have reverted to the State. And although this proceeding was not had, yet on his death the land passed to the State, as an alien could not transmit it by will.

It is proved that the devisor was an alien. But under the act of Congress of the 27th March, 1816, it is provided that "any alien residing in the United States before 1802, may be admitted to the rights of citizenship without proof of having

resided, etc., five years," etc. Under this act, it is alleged, that Jones became a citizen; and we think there is reasonable proof of the fact.

The defendant shows a sheriff's deed in 1828, and a record of a judgment and execution in Knox county, against Thomas Jones, under which the land in controversy was sold to Welburn; also, a deed from Welburn and wife to Block, and from Block and wife to the defendant.

The judicial proceedings in Knox county were irregular. The judgment was obtained against one executor, there being two. And it was against the lands and tenements of the defendant, when there was no statute authorizing such a procedure. At common law, a judgment against an administrator or executor, does not authorize a sale of the real estate of the deceased.

Under the charge of the court, the jury found the defendant guilty, as charged in the declaration, to the extent of the interests represented by the lessors of the plaintiff. And there was a judgment entered on the verdict.

JOHN MASON v. D. C. WALLACE.

To entitle a purchaser to a specific execution of his contract, he should make payment either within his contract, or at least within a reasonable time afterwards. If there be great negligence and delay in the payment, and the property is greatly enhanced in value, the court will refuse to give effect to the contract.

But where the purchaser has entered into the possession of the property, and made improvements on the ground of four or five times the value of the land, the court will presume an acquiescence by the vendor, and will decree a conveyance, on the payment of the money, notwithstanding the delay.

But the court required the purchaser to pay interest up to the time the money was paid.

Messrs. Stevens and Thornton for complainant.

Mr. Smith for defendant.

OPINION OF THE COURT.

THIS is a bill for the specific execution of a contract, and the defense is, that the complainant has been negligent in making his payments, and, therefore, not entitled to a decree.

The contract was a purchase of certain lots in New Albany, and several years have elapsed since the purchase, and the complainant took no effectual steps to perform his contract, until a tender of the money was made a short time before this bill was filed.

But the complainant, shortly after the purchase, entered into the possession of the property, and made permanent and lasting improvements upon it. The improvements have cost more than four times the value of the lots, and they were made with the knowledge of the defendant, and with his presumed acquiescence. The complainant averred a readiness to pay, which the answer denied.

If this case stood upon the contract alone, we should have no hesitancy in dismissing the bill. Where time is not made the essence of the contract, the purchaser is bound to pay the consideration in a reasonable time. That time may vary according to circumstances, and not unfrequently an excuse may be deemed sufficient for the delay. But where change in the value of the property occurs, and there has been unnecessary delay, chancery will not aid the purchaser. Some of the courts, in late decisions, have shown a disposition to require more promptness in the purchaser, than has, heretofore, been required. Where the relative position of the parties, in regard to the property, remain unchanged, and there are no circumstances of hardship, the interest on the money is often deemed a compensation for the delay of payment. And this is especially the case where the purchaser is in possession of the property, and has expended large sums in improving it.

In the case under consideration, the improvements made by the complainant are permanent, and of great value; and the fact of delay is the only objection made to a specific execution of the contract. The improvements could not have been made without the knowledge of the defendant. The complainant was not formally put into possession by the defendant, but there was an acquiescence in his possession, and in the expenditures on the property. Under the circumstances, we feel bound to give effect to the contract, but in doing so, we will require the complainant to pay interest on the sum due, up to the time of making the payments, and the court will require this to be done in sixty days.

WESCOTT AND COMBLOS v. COLE AND SHELBY.

A court of equity may direct an equity to be sold, but in such case the interest sold should be ascertained, and made known at the time of the sale.

In Indiana a title bond is assignable.

Messrs. *Fletcher* and *Butler* for complainants.

Mr. *Dunn* for defendants.

OPINION OF THE COURT.

COLE gave his note to complainants 17th June, 1842, for _____ dollars, and at the same time executed a mortgage to secure the payment of the note, on land in Clarke county. He also transferred a title bond held by him and given by Shelby and Shelby, for a piece of property in the same county, "conditioned" for making a deed on payment of eighteen hundred dollars. A title bond is assignable by the statute of Indiana.

The bill prays for a sale of the mortgaged premises, and also of the interest assigned in the title bond.

There was no answer filed by the defendant, and a decree *pro confesso* was taken against him.

Michael Stockwell v. Kemp & Buchey.—Benjamin Huffman v. Kemp & Buchey.

The defendant objected, that there was no averment in the bill of the payment of the eighteen hundred dollars.

There is no evidence of the payment of this sum, still in chancery whatever interest the assignor may have can be sold. The court will provide in the decree, that the purchaser at the sale of the master shall know what he buys.

It is also objected that unless Cole could sue in this court, his assignee can not sue. This is undoubted. But there is nothing in the bill to show that Cole was a citizen of Indiana at the time he made the assignment, and, consequently, the defendant being in default, is not in a condition to raise the question.

The court will direct a sale of the mortgaged property, and also of the equitable interest of Cole, under the title bond, giving special directions, etc.

MICHAEL STOCKWELL v. KEMP AND BUCHEY.

BENJAMIN HUFFMAN v. KEMP AND BUCHEY.

Securities on a replevin bond are entitled to have their land sold, under the law in force at the date of the bond.

A sale on other principles will be set aside on motion.

Mr. *Smith* appeared for plaintiffs.

Mr. *Bright* for defendants.

OPINION OF THE COURT.

MOTIONS are made in both of these cases resting upon the same facts. On the 21st of November, 1842, Kemp and Buchey recovered a judgment in this court against John Sims, for two thousand four hundred and seventeen dollars and seventy-eight cents, and costs; and on the 21st of January, 1843, the above plaintiffs executed a replevin bond to stay the execution of the judgment. Before the stay had expired, John Sims, the judgment defendant, died; after

Michael Stockwell v. Kemp & Buchey.—Benjamin Huffman v. Kemp & Buchey.

which execution was issued against the plaintiffs on the replevin bond, which, under the statute of Indiana, has the force and effect of a judgment. The execution was levied on the real estate of the plaintiffs, which was appraised, in the first instance, under the statute, but was afterward sold by order of the plaintiffs in the execution, without the consent of the defendants, and in disregard of the appraisement. The sale has been returned, and a motion is now made to set it aside.

The ground relied on is, that the lands levied upon can only be sold on the appraisement or valuation laws of the state of Indiana, in force at the date of the replevin bond. These laws require real estate to sell for two-thirds of its appraised value. Acts of 1842, p. 64.

The motion must be sustained, and the sale will be set aside. The replevin bond was a contract, by which the plaintiffs in the motion become bound. An instrument authorized by the statute, and to which the effect of a judgment was imparted. The liability of the defendants in the execution arises wholly under this bond, and no reference can be had, to the original instrument on which the first judgment was obtained. This being a statutory bond, the liability under it, must be enforced conformably to the laws then in force. Whilst the stringent provision of the act, making this bond a judgment, other acts in *pari materia*, which are in some degree favorable to the execution defendants, must also be applied. The sale on the execution, by the marshal, is set aside.

FIELDING LOWRY v. PETER WEAVER ET AL.

Indians living within a State, and doing business as merchants, are responsible by the laws of the State, for the payment of their debts.

This presupposes that they are not considered under the laws of the United States.

Lands reserved to them under a treaty, which vests in them the title, but which restricts them from conveying it, except with the consent of the President of the United States, descend under the laws of the State, and may be made responsible for the payment of debts.

The reservation as to the conveyance is personal, but such lands are subject to the operation of the State law.

The law, thus substituting an agency, conveys the title without the sanction of the President.

This court will recognize the procedure of a court of probate, through which Indian lands have been thus sold, where the court had jurisdiction, and the proceedings upon their face appear to have been regular.

Mr. Smith for the complainant.

_____ for defendant.

OPINION OF THE COURT.

THIS is a bill in chancery. Previous to the 17th of August, 1817, John W. Burnet and the complainant were partners in merchandizing, and on that day they settled their accounts, and a balance was found due by Burnet of two thousand four hundred seventy-nine dollars and ninety-four cents, for which he gave his note to the complainant.

By the treaty of St. Mary's, in 1818, two sections of land on Flint river, near the Wabash, in Tippecanoe county, were granted to Burnet. As usual in Indian treaties, there was a provision that this grant to Burnet and his heirs, should never be conveyed without the consent of the President of the United States.

In the year 1826 Burnet died, not having paid Lowry any part of his debt, or conveyed any part of his land. He left certain brothers as his heirs, but at the time of filing this bill the only surviving heirs were, William Davis and Richard Davis, the latter a minor, citizens of Indiana, and Mary Bur-

net and Francis F. Palms, citizens of Michigan, who are not made parties to this suit.

Administration of the estate of John W. Burnet was granted in the year 1831, by the probate court of Tippecanoe county, to Peter Weaver, who gave bonds and entered upon the trust.

On the 7th of January, 1832, Lowry filed the note of Burnet in the probate court, with the assent of Weaver, the administrator, there being no presumption of payment, and there being no personal assets to pay the note. The administrator filed his petition to the court, for an order to sell seven hundred and sixty-eight acres of the land granted to Burnet and his heirs by the treaty, it being one entire section, and the remainder of the other section, after a sale made by Tipton, after the death of Burnet, as agent of one of his heirs, to the said Peter Weaver, to satisfy the debts of the estate, including the debt due to the complainant.

Upon the filing of the petition, the probate court made an order of publication against the non-resident heirs, and the resident heirs appeared by their guardian *ad litem*, and at the next term, proof of publication being duly made agreeably to law, the note of the complainant, though not objected to and admitted by the administrator, was proved as to the confessions of one of the heirs, a regular default was taken as to the non-resident heirs, and an order was made that the land named in the petition and described in the bill, should be sold by the administrator, and the sale was made by the administrator in due form to Lowry, the complainant, for one thousand three hundred eighty-eight dollars and eighty cents, being the full value thereof; and the probate court, on a return of the sale, confirmed it, and ordered the conveyance to be made to Lowry, which was done, and a credit was entered on the note, for the sum for which the land was sold.

After the purchase and receipt of the deed, Lowry applied to the President of the United States to obtain his approval

of the conveyance, which was refused, because a partition of the estate of Burnet had been previously made, and the land in question had been set apart to Rebecca Burnet, one of the heirs, who had sold it in trust to Francis Palms, who claimed title; the department submitting it to the courts to say, in whom was vested the legal title, and to whom a patent should issue.

On the 30th of July, 1832, Lowry sold to Peter Weaver, the administrator, the one hundred and twenty-eight acres, a part of the second section, for the sum of six hundred and forty dollars, and gave a bond for a title on or before the 1st of January, 1834, provided the deed to Lowry should be approved by the President, or so soon as the purchase money should be paid. Weaver paid one hundred seventy-one dollars and seventy-six cents of the purchase money, entered into the possession of the land, and has ever since occupied it. Long since, Lowry tendered to Weaver a general warranty deed for the land, and demanded payment of the balance of the purchase money; which being refused, he offered to rescind the contract, and pay back the purchase money which he had received, but Weaver refused. And the bill avers that the balance of six hundred and forty dollars, with the interest, deducting the sum paid, is still due.

The residue of the section of which Burnet died seised, is held by Weaver, who has refused to act as administrator, in subjecting it to sale, for the residue of the complainant's demand, alleging that he claims it by purchase.

The object of the bill is—

1. To compel the administration of the residue of the land of which John W. Burnet died seised, which was not administered by Weaver, and which he claims as a purchaser.
2. To compel Weaver to receive the deed tendered for the one hundred and twenty-eight acres, and to pay the residue of the purchase money.
3. To compel Weaver to discover the assets of the estate.

Weaver has answered, substantially admitting the facts stated, and one of the defendants, William Davis, who has come of age since the filing of the bill, and who had answered by his guardian, has filed a plea of the statute of limitations; the other infant defendant has answered by guardian *ad litem*.

The great question in the case is, whether the real estate in question was liable for the payment of the debts of Burnet; and was subject to be made assets, by the administrator, under the laws of Indiana.

It has been the policy of the government in making grants to Indians, sometimes called reserves, specially to provide in the treaty, as in the case before us, that the conveyance by the Indian should be made only by the sanction of the President. This was intended to protect the Indian right, he being, from his untutored condition, incapable of guarding his interests against the impositions and frauds of his white neighbors. This was a wise policy, but, it is believed, that it has fallen short of that protection which it was intended to afford. Such are the devices of dishonest men, that the utmost vigilance can not detect and redress, all the mischievous tendencies of their acts. And this is especially the case when they are brought in contact with the uncivilized Indians.

But the deed in question does not come within the provisions of the treaty. The grantee, and, perhaps his heirs, may not be able to make a valid conveyance of the land without the approval of the President. That may be considered a condition within the original grant, and is limited to the personal acts of the grantee and his heirs. But the conveyance under consideration is by operation of law. The land is not withdrawn from the sovereign action of the State. Like other lands, it may be taxed by the State, and is subject by the local law to the payment of debts. This belongs peculiarly to State power. It regulates the transmission of real estate by deed or by operation of law, and subjects it, in the

Fielding Lowry v. Peter Weaver et al.

mode prescribed, to the payment of debts. Except by compact, or the voluntary legislative action of the State, lands within its limits can not be withdrawn from its ordinary action.

For the payment of debts, the law provides a mode by which the lands of infants, who are incompetent to make a contract, may be sold. And no reason is perceived why the same rule should not apply in the case under consideration. It is a general principle, that the property, both real and personal, of persons capable of contracting debts, may be made liable for the payment of debts. The property gives them credit, and in sound policy and justice, it should be held responsible for their debts. The grantee of the government in this case was capable of making contracts, and was legally responsible under them. And although by the restrictions of the grant he could not alien, yet, there would seem to be no inconsistency in saying, that the State law may substitute an agency through which the land may be reached by creditors.

The genuineness of the claim against the estate of Burnet, seems to be well established.

Is the claim barred by the statute of limitations? The counsel for the complainant in answer to this says, that the statute does not operate on promissory notes. Revised Stat. 1831, p. 686, 711. 1 Black. 378.

The sanction given to the note by the probate court, where notice had been given to the parties interested, as the law requires, and also by the administrator, is satisfactory evidence not only to the hand-writing of the promiser, but to the justice of the consideration.

The allegations of the plea are unsupported by an answer, and the facts and circumstances of the case rebut the presumption of payment. No irregularity is pointed out by the counsel, in the probate court. 8 Cowen, 350; 3 John Ch. Rep. 384. And as that court had jurisdiction of the subject

matter before it, the court must treat the proceeding, until reversed or set aside, as valid.

If there were a defect of title, Weaver could not maintain the possession of the land purchased by him, and refuse to pay the consideration. He is bound to rescind the contract, receive the money back he has paid, and give up the land, or pay for it and receive the deed. Believing that the title is valid, the court will decree a specific execution of the contract. On the tender of a general warranty deed by the complainant, the defendant shall pay the balance of the consideration, and interest thereon. And as to the land purchased by Weaver, it must be considered as subject to the payment of the debts of the ancestor, Weaver having notice of all the facts.

The court will decree that the heirs before the court, who have a claim to the land purchased by Weaver, shall pay their respective proportions of the balance of the debt due to the complainant in ——— months; and in default thereof the interest in the lands of the heirs who are defendants, shall be sold, etc., and that the defendants shall pay the costs, etc.

VARNUM v. BELLAMY.

W and B executed their note for eight hundred and ninety-nine and fifty-three hundredths dollars to the order of B, and negotiable at a chartered bank in Indiana. B indorsed it for the accommodation of the makers in blank, and they transferred it to V, in payment of a pre-existing debt due from them to him. Held, that in a suit by V against B on his indorsement, it was no defense to the suit that the indorsement was made without consideration, although V knew it when he received the note.

The pre-existing debt due to the holder of the note from the makers, was a good consideration for its transfer.

An attorney who receives a note for collection, can not, without special instructions, make any agreement which will bind his principal, by which the indorser could be released from his liability.

Forbearance to sue the makers of a negotiable note will not release the indorser,

Varnum v. Bellamy.

and unless an agreement for delay is such as will, for a time, tie up the creditor's right of action, it is nugatory.

The indulgence which will release an indorser of negotiable paper, must not only be given upon a good consideration, but it must be for some limited and definite time, within which the creditor's right of action is suspended.

The payment of a part of the debt, and accepting claims to be applied when collected in further payment, under a verbal agreement not to sue, constitute no legal consideration for the promise of forbearance.

Mr. *Judah* for plaintiff.

Mr. *Cooms* for defendant.

OPINION OF JUDGE HUNTINGTON.

ASSUMPSIT by Varnum, the holder, against Bellamy, the indorser of a promissory note for eight hundred and ninety-nine dollars and fifty-three cents, dated Nov. 23rd, 1840, payable and negotiable ninety days from date, at the Fort Wayne Branch of the State Bank of Indiana. The note is made by Wright and Dubois, and payable to the order of Lyman G. Bellamy, who indorsed it in blank. Since the commencement of the suit, Bellamy has died, and the action is now against his administratrix, Caroline Bellamy. The declaration is in the usual form. The only pleas on file are the general issue, and *plene administravit*. As no proof has been introduced applicable to the last plea, that part of the case need not be again referred to.

The first ground of defense insisted on is, that the note in question was given solely as an accommodation note, to be discounted at the Fort Wayne Bank—that the indorsement was made with that understanding and without consideration, and that it was delivered to the plaintiff by the makers, in violation of that understanding, and thus diverted from its original purpose. This matter being in avoidance of the note, should have been specially pleaded, but no such plea is found among the papers. Inasmuch, however, as the question was considered on the trial and made the subject of an elaborate written argument by defendant's counsel, as well as

referred to in the testimony, I have apprehended that perhaps such a plea had been filed and mislaid. I will, therefore, briefly consider the question as if such an issue had been made. The note in question is in the usual form of notes offered for discount in Bank, with the addition of the words "with current rate of exchange." The following is an exact copy:

"\$899 53.

FORT WAYNE, Nov. 23rd, 1840.

Ninety days after date, we promise to pay to the order of L. G. Bellamy, eight hundred ninety-nine and fifty-three hundredths dollars, negotiable and payable at the Branch Bank at Fort Wayne, with current rate of exchange.

WRIGHT & DUBOIS."

It will be perceived, that under the statute which governed it at that time, Rev. Stat. 1838, p. 119, this paper being made payable, etc., at a chartered Bank, was placed on the footing of inland bills of exchange. The statute of 1843, has made some change in the law in this particular, which it is not now necessary to examine. This, then, being the character of the instrument, it is invested with all the attributes of commercial paper, and governed by the law merchant. It appears, from the testimony, that the note was delivered to the plaintiff, by the makers, before it became due, in payment of a pre-existing debt of that amount—that the plaintiff, or some one for him, placed it in Bank for discount—that the Bank refused to discount it—that when it fell due, it was regularly protested, for non-payment, of which Bellamy had notice, and that it was withdrawn from the Bank by the plaintiff, and placed in the hands of Thomas Johnson, an attorney of Fort Wayne, for collection.

It seems that where a third person becomes the holder of a bill or note, negotiable by the law merchant, which had been obtained without consideration, if it can be proved that he had notice of the transaction between the original parties, and gave no value for the note or bill, he would be affected

by every thing which would affect the first holder. *Munson v. Chesebrough*, 6 Black. 17. This, however, is not such a case. The pre-existing debt, due from the makers to the plaintiff, was a good consideration for the transfer. It is a case in which the indorser lent his name and credit to the makers for their benefit, and in which the plaintiff is a *bona fide* holder for value, and though the latter took the note with a full knowledge that the indorsement was made without consideration, it is not a circumstance which can relieve the indorser from liability. *Niles v. Porter*, 6 Black. 44, and cases there cited of *Smith v. Know*, 3 Esp. R. 46; *Charles, et al. v. Marsdon*, 1 Taunt. 224; *Adams v. Gregg*, 2 Stark. R. 531. "These decisions (says the Supreme Court of Indiana, in the case first cited,) are founded on the policy of the law in favor of commerce, which forbids a person to give credit and circulation to negotiable paper by his name, and then object to a fair holder for a valuable consideration, that his signature was without consideration." The same principle which applies to the acceptor of a bill, applies to the indorser of a promissory note for the accommodation of the maker. *Smith, et al. v. Becket*, 13 East. 187; *Brown v. Mott*, 7 John. 361. There is another circumstance in this case, however, which repels the pretense that this note was not executed and indorsed for the very purpose to which it was applied. The plaintiff was, and still is a resident of New York. The note in question contains a promise, not usual certainly in notes intended solely as accommodation paper for discount, to cover the exchange between Fort Wayne and New York.

The second ground of defense is, that Johnson, the attorney of the plaintiff, when he received the note for collection, entered into an agreement with the makers to receive from them certain claims which they held upon other persons, which, when collected, were to be applied upon this note; that Johnson was to have five per cent. for collecting them; and that they were to pay also a small amount of money, which

was to be applied on the note; and that, in consideration thereof, Johnson agreed not to bring suit, and did retain the note in his hands for about the period of two years after it fell due.

The only evidence in the cause, (except the proof of protest, etc.,) is furnished by the depositions of Dubois, one of the makers of the note. It seems that he has been examined on three several occasions, and the last time was cross-examined by the plaintiff's counsel. The witness evidently shows a strong bias in favor of the indorser, and there are some discrepancies in his statement, not compatible with the utmost candor. It seems, from his last deposition, that some time after the note fell due, and was protested for non-payment, it was placed in the hands of Thomas Johnson, an attorney of Fort Wayne, Indiana, where the makers and indorser resided, for collection; that when called on for payment, the witness, one of the makers, told the attorney that they were unable to pay it, but that if he would take a small amount of money, and some claims which they held against other persons, they would turn them out, and allow Johnson five per cent. for collecting them—the money so to be paid, and the claims, when collected, to be applied in payment of the note. It seems that Johnson acquiesced in the proposition; that a small sum of money was paid, and that claims to a considerable amount were placed in his hands. The witness says, also, that "the understanding was, that he (Johnson, the attorney,) was not to sue on the note," and that he retained it in his possession without suit for some two years.

There are two questions which arise upon this state of facts. The first is, was the attorney authorized to make such an arrangement as he did make? It is said, in the case of *Miller v. Edmonston*, decided by the Supreme Court of Indiana, November 2d, 1846, but not yet reported, that "when a demand is placed in the hands of an attorney at law for collection, without any special instructions, the authority confer-

red upon, and the duty assumed by him, is to use due diligence to collect the debt by suit or otherwise; he has no authority to compromise with the debtor, and can not bind his principal by any arrangement short of an actual collection of the debt." In this case it does not appear that Johnson, the attorney, had any "special instructions" authorizing him to make such an agreement. It is true the witness swears that Johnson told him "he was authorized to take claims on the note," but he nowhere states that Johnson informed him that he had authority to extend the time of payment. The agreement, therefore, was nugatory, unless sanctioned by the principal. Whether it was competent for the defendant to prove the declarations of the attorney, in reference to his authority, it is unnecessary to decide.

The other question is, was the forbearing to sue the makers of the note, as above stated, such an indulgence as will release the indorser? I think that it was not, even supposing the agreement to have been made upon sufficient authority. "The agreement for delay, must be such an one as for a time will tie up the creditor's right of action." *Braman v. Houk*, 1 Black. 392, and note 2.

The indulgence which will release an indorser, must not only be given upon a good consideration, but it must be for some limited and definite time, within which the creditor's right of action is suspended. Chitt. on Bills, 9th Am. Ed. 446. In this case, both these requisites are wanting. The payment of a part of the debt, after the whole became due, and the transfer of claims, to be applied when collected, in further payment of the note, constituted no legal consideration for the promise of forbearance. *Berry v. Bates*, 2 Black. 118. No time was fixed within which the attorney agreed "not to sue." It was a mere verbal promise, founded upon no sufficient consideration, and might at any time have been disregarded.

These views do not in any manner conflict with the princi-

ple laid down in the case of *The Bank of the United States v. Hatch*, 1 McLean's R., afterward reviewed by the Supreme Court of the United States, 6 Peters, 250.

Judgment for plaintiff *de bonis testatoris*.

VARNUM & CO. ET AL. v. R. MILFORD ET AL.

A judgment being assigned of five thousand dollars to secure debts of a much smaller amount, the court will direct the debts to be paid out of the first proceeds of the land sold under the judgment.

This appears to be necessary to pay the debts, it not appearing that there is any property out of which the whole amount of the judgment can be made.

An agent who has full notice, is sufficient to charge the principal with notice.

An individual purchasing property on judicial sales, under the above judgment, will be compelled to pay the money to the persons for whose security the judgment was assigned.

Messrs. *Ingram* and *Jones* for plaintiffs.

Mr. *Baird* for defendants.

OPINION OF THE COURT.

THE defendants assigned to the plaintiffs a judgment against Worthington, on the 13th October, 1838, in Warren county, Indiana, for upward of five thousand dollars, to pay certain sums due to the plaintiffs, who are citizens of New York. And this bill is filed to compel the payments of the sums received by the defendants on the judgment after the assignment. The sums intended to be secured by the assignment, were to Varnum & Co. one thousand six hundred eighty dollars and forty-one cents; Richard Kingland & Co. six hundred seventy-six dollars and thirty-two cents; J. C. Baldwin & Co. one hundred thirty-five dollars and seventeen cents.

The assignment was made by Milton H. Milford, of so much of the judgment as would pay the plaintiffs' claims.

Execution was issued in Warren county, and sales were made to the amount of six hundred forty-six dollars and seventy-nine cents, which was receipted for by Milton H. Milford, in behalf of the plaintiffs, and the deed was made by his order to his father, Robert Milford. Other sales of real estate were made in different counties of the State, and the moneys were paid over to the plaintiffs, and receipted for by them.

It is insisted by the defendants that, as the judgment assigned, exceeded the amount due to the plaintiffs, they were not entitled to the first moneys received under it. That the assignors were entitled to the first receipts on the sales, until the amount of the judgment was reduced to a sum sufficient to cover the amount of the complainants' demand. There is no such condition in the assignment. The judgment was given to pay the debts due the complainants, and it is fair to suppose that the intention of the parties was, to pay the complainants their amount out of the first moneys realized from it. The assignors were trustees for the plaintiffs. It does not appear that the defendants in the judgment have sufficient property in the State, or out of it, to discharge the judgment; and if the complainants were to be postponed, as contended for, the security under the assignment might be of no value.

It is contended that Robert Milford, who received the deed for the land in Warren county, had no notice to affect his liability. His son, who acted as his agent, and made the original assignment of the judgment to the plaintiffs, had full notice. Having acted in the matter, no special notice was necessary at the time he made the purchase for his father. He must be held responsible to the plaintiffs for the purchase money.

The assignment of the judgment, by which the plaintiffs gave time, released Robert Milford, as indorser on the notes held by the plaintiffs. As all the moneys received under the judgment, were paid over to the complainant, except for the

sales of lands in Warren county, conveyed to Robert Milford, the court will dismiss the bill as to the other defendant, and decree that he shall pay to the complainants six hundred ninety-eight dollars and fifty cents, and costs; and that this sum be distributed among the complainants *pro rata*; and that execution issue, as on a judgment at law.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JUNE TERM, 1846.

WILLIAM R. THOMPSON *v.* DAVID EMMETT.

Where from the record it appears that the defendant appeared in the action, that fact can not be denied by plea or otherwise.

As well might there be a denial of a judgment.

But where from the record it does appear that there was no personal service on the defendant, who entered no appearance, the judgment is a nullity.

To such a record the plea of *nul tiel* record is proper.

A judgment on an attachment being a proceeding *in rem*, is no ground for an action out of the State.

Mr. Logan for the plaintiff.

Mr. Campbell for defendant.

OPINION OF THE COURT.

THIS suit is brought on the record of a judgment rendered in the district court of Allegheny county, state of Pennsylvania. The defendant pleaded *nul tiel* record; and also that process was not served on the defendant.

A motion is made by the plaintiff's counsel, that the defendant shall be required to make his election of one of the two pleas filed, on which he will rely for his defense.

This court held, in *Lincoln v. Tower*, 2 McLean, 473, that where it appeared from the record the defendant had personally appeared, the fact could not be controverted by a plea. That it was a fact verified by the record, and under the act of Congress, could not be contradicted by plea or otherwise, any more than the judgment itself. A reference is made to

that case, where the principles which apply to this case, were discussed.

But the record of the judgment of Pennsylvania, on which this proceeding is founded, does not show that there was an appearance to the suit by Emmert. A foreign attachment was issued against him, as a non-resident, and against others who were named as residents, on one of whom the attachment was served. Several persons were served as garnishees of Emmert. An *alias* and a *pluries* writ of attachment were issued. A judgment was entered against Emmert "for want of an appearance and plea," for the sum of four thousand five hundred thirty-eight dollars and thirty-two cents. On the 6th of March, 1841, there was a rule to show cause, on Saturday next, why the judgment and proceedings should not be set aside. This motion was afterward withdrawn, and on the 8th of December, 1841, rule was granted to show cause why judgment should not be set aside. On the 8th December, 1842, leave was given to the plaintiff to amend his declaration, which was objected to. And then follows the entry, "that the judgment entered on record against Emmert is set aside as irregular; and now, to wit, December 8th, 1842, judgment against defendants, for want of an affidavit of defense;" and on the 5th of February, 1842, on argument the court set aside the judgment, if any there be against these, who were summoned as garnishees only. The liquidated sum is stated to be five thousand one hundred fifty-eight dollars and ninety-four cents.

On the 9th of July, 1839, the record states an execution was issued against Emmert, not including the other defendants, which was returned *nulla bona*; and then an entry, this was under the judgment first entered, which was afterward set aside; and that a *sci. fa.* issued against garnishees, to July term, 1839; and that they all answered and showed that there were no effects of Emmert's in their hands, and that they were not indebted to him.

From an inspection of the record, it no where appears that Emmert was personally served with process, or that his property was attached. The record is extremely irregular, and how a judgment could have been entered against Emmert, is not easily perceived. If the property of Emmert had been attached, the rule is well settled, that a judgment entered against him on such a process, he not having had personal notice of the suit, nor entered his appearance, can have no effect, out of Pennsylvania, against the defendant. It is considered a proceeding *in rem*, and out of the State can not affect the rights of the defendant beyond the property attached. In Pennsylvania, as in Ohio, such a judgment may be good against all the property of the defendant in the State. This, perhaps, may be within the power of the State; the property within its jurisdiction may be made subject to the payment of debts in the mode which the law-making power may deem just. But such a law can have no extra territorial effect; nor can a judgment entered on an attachment be considered in another State, as of any validity to charge the defendant.

We are inclined to think that under the plea of *nul tiel* record, the record must be rejected, if upon its face it appears no notice was served on the person against whom the judgment was entered. If the proceedings were void for a want of this notice, then is there no valid record upon which a recovery can be had, and, consequently, there is no such record as the plaintiff has set out in his declaration.

The plea of *nul tiel* record is sustained, and as there is no other ground on which the action can be sustained, a nonsuit is the consequence.

UNITED STATES v. E. C. DUNCAN ET AL.

Dower is a clear legal right, and can not be divested except upon full knowledge of the widow's rights.

If she accept what by the will is given in lieu of dower, not knowing the extent of the estate, she may renounce under the will, and claim, after the lapse of years.

And in some cases, where it shall be necessary, she may bring a suit to ascertain the true condition of the estate, to enable her to make a proper election.

The statute of Illinois, declaring "that any provision in the will bars dower," must have a reasonable construction.

To bar dower, the amount must be such as to afford a reasonable presumption that it was given in lieu of dower.

Unless the will shall be express on the subject, a small amount of personal property, the estate being large, not sufficient.

Mr. *Butterfield* for the United States.

Mr. *Harden* for the defendant.

OPINION OF THE COURT.

THIS bill was filed by the United States to subject the lands of Gen. Duncan, deceased, to the payment of liabilities incurred by him as a security for Linn, who was a receiver of public moneys at Vandalia, and who was a defaulter to a large amount, for which a judgment was obtained against Duncan. And this bill was brought to investigate the title to the lands of Duncan's estate, ascertain the extent of his interests, and remove all embarrassments. The question now raised and discussed, and which we are to decide, is, whether the widow of Gen. Duncan is entitled to dower.

That the statute gives her dower in all the real estate of her deceased husband, as well that which he held by contract as that which he held by deed in fee simple, is not disputed; but it is alleged that she is barred under the will. By the will, Mrs. Duncan received a considerable amount of personal property, and, it seems, she has not renounced this right to claim her dower under the statute.

On the part of the government, it is contended that where

at common law a devise is made in lieu of dower, in a reasonable time, the widow must make her election to claim dower, or she will be barred. 8 Paige Ch. Rep. 328; 4 Kent's Com. 57. He says, "it is likewise settled, that a collateral satisfaction, consisting of money or other chattel interests, given by will and accepted by the wife after her husband's death, will constitute an equitable bar of dower." She may make her election to claim dower, some years after her husband's death, and where she has received that which was intended to be in lieu of dower, if she acted in any degree in ignorance of her rights. But where she has acted with a full knowledge of her rights, in the acceptance of the testamentary provision instead of her dower, she will be bound by her acceptance.

But the question is, whether the bequest referred to, was given, or intended to be given, in lieu of dower. Certain real estate had been conveyed to Mrs. Duncan, to secure her against contingencies, which was greatly below the estate she brought to her husband. This can in no sense be considered operating against her claim of dower. It was only returning to his wife a part of the estate which she had in her own right, and which he came into the possession of by marriage.

It is argued that it was the intent of the testator to give personal property in lieu of dower. But there is no expression in the will which authorizes such an inference, unless it be the simple fact, of bequeathing the personal property. In deciding this question, regard must be had to the condition of the parties. Gen. Duncan was a man of large property, and at the time of his death, in all probability, expected to be relieved, in some form, from a part of his suretyship. He seems only to have been embarrassed on this account.

It is true, the Revised Statutes of Illinois, of 1833, p. 624, "declare that any provision by will bars dower, unless it be otherwise expressed in the will, and unless the widow in six months renounces the provision."

Now this provision must have a reasonable construction. Will it be contended that any bequest in the will to the wife, however small, will bar dower? Such could not have been the intention of the Legislature. And if this construction be not sustainable, is there any other rule than that the bequest should be such as would be a reasonable compensation for dower in the real estate? Can the wife be divested of her dower, which is a legal right, on any other principle? Is she barred of her dower, if she accept a gift of five or twenty dollars, or some piece of furniture under the will from her dying husband, as an evidence of his affection? Certainly she is not. Where any property was bequeathed to the wife, which from the amount, might be presumed under the statute to be in lieu of dower, and there was nothing in the will to contradict this presumption, she would be bound by it, ordinarily, unless her election of dower were made in six months. This appears to be a reasonable construction of the statute, which will effectuate the intention of the Legislature.

In treating upon this subject, Mr. Justice Story, in his *Treatise on Equity*, sec. 1088, says: "If a testator should bequeath property to his wife, manifestly with the intention of its being in satisfaction of her dower, it would create a case of election. But such an intention must be clear and free from ambiguity. And it would not be inferred from the mere fact of the testator's making a general disposition of all his property, although he should give his wife a legacy; for he might intend to give only what was strictly his own, subject to dower. There is no repugnancy in such a bequest." "Besides," he says, "the right to dower being in itself a clear, legal right, an intent to exclude that right by a voluntary gift, ought to be demonstrated, either by express words, or by clear and manifest implication."

This is the substance of the authorities on this subject. In *Birmingham v. Kirwan*, 2 Sch. and Lefr. 452, in the clear language of Lord Reddesdale, the above doctrine is forcibly

illustrated. 10 Pickering, 510. In *Clark v. Sewell*, 3 Atk. 97, it is said, "what is given by a will, ought, from the character of the instrument, ordinarily be deemed as given as a mere bounty, unless a contrary intention is apparent on the face of the instrument," "or, as it has been well expressed, whatever has been given by a will is *prima facie*, to be intended as a bounty or benevolence."

But there seems to have been a renunciation under the will after the lapse of eighteen months, which, it is contended, is too late, as the statute requires it to be done in six months. Here, too, the statute must receive a reasonable construction. Suppose the widow remains in utter ignorance of the estate of her husband, and has no means within the time limited, to ascertain the facts which would enable her to make an election. It has often been held, that years, under certain circumstances, may be allowed for this election. That the widow may file her bill to obtain a knowledge of the estate. That where she has been in possession of the bequest for years, under an ignorance of the estate, she may renounce under the will and claim dower.

From the nature of the case, it must be perceived that there are cases in which the election could not be made in six months, and it would not be extending the principles of equity beyond their legitimate limits, in such cases of hardship, to relieve the widow. The estate of Gen. Duncan was large, and by the suretyship named, much embarrassed. It was impossible to understand the extent of the property and the nature of his liabilities, it would seem, in six months, so as to determine this matter.

Upon the whole, when we consider the small amount of the personal property bequeathed, one-third of which belonged to the widow, the presumption can not arise, that the bequest was given in lieu of dower. And no fair construction of the statute would bring such a case within it.

We think Mrs. Duncan is indowable of the lands of her

husband, and commissioners will be appointed to set it off, unless an arrangement on the subject shall be made.

UNITED STATES v. LEE.

An accomplice may be used as a witness, from the necessity of the case, in many instances.

And if so used, and from his testimony, he appears to have acted in giving testimony in good faith, the government can not further prosecute him.

It is bound in honor to discontinue the prosecution. In testifying he implicated himself, and although the person on whose trial he gave evidence was acquitted, that does not alter the case of the witness. If he acted in good faith, as the court think he did, in giving testimony, he should be discharged.

If the prosecuting attorney shall not enter a *nolle prosequi* against him, which the court think is the better course, they will continue the case until a pardon shall be procured.

Mr. Gregg, District Attorney.

Mr. Butterfield for defendant.

OPINION OF THE COURT.

THE defendant was indicted for stealing from the mail. And having been used as a witness on the trial of Warner, an accomplice, a motion is now made that he be discharged on that ground.

The prosecuting attorney opposes this motion on the ground that, at most, the defendant has only an equitable claim to a pardon, and that on this ground the cause may be delayed; but the defendant cannot be discharged. Roscoe's Cr. Ev. 147; 2 Russel on Cr. 598.

An accomplice is used by the government, because his evidence is necessary to a conviction. Being called as a witness, there is an implied obligation by the government, if not expressed, that if the witness shall make a full and honest disclosure of the facts, which have a direct bearing on the case, he shall not be prosecuted.

Mr. Greenleaf, in his treatise on Evidence, says, 1 vol. Sec. 863: "In regard to defendants in criminal cases, if the

State would call one of them as a witness against others in the same indictment, this can be done only by discharging him from the record; as, by the entry of a *nolle prosequi*, or, by an order for his dismissal and discharge where he has pleaded an abatement, etc.; or by a verdict of acquittal where no evidence, or not sufficient evidence, has been adduced against him." 1 Bill. N. P. 285; Cas. Temp. Hardw. 163; 9 Cowen, 708; 2 Stark. Ev. 11; *Commonwealth v. Knapp*, 10 Pick.

In Section 879, Mr. Greenleaf says, "The admission of accomplices, as witnesses for the government, is justified by the necessities of the case, it being often impossible to bring the principal offenders to justice without them. The usual course is, to leave out of the indictment those, who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial, at the same time with his companions in crime." And again: "But whether an accomplice already charged with the crime, by indictment, shall be admitted as a witness for the government, or not, is determined by the judges, in their discretion, as may best serve the purposes of justice." "If he appears to have been the principal offender, he will be rejected." *The People v. Whipple*, 9 Cowen, 707.

In the case of Lee, he was used as a witness with an understanding, that he would not be prosecuted to conviction, provided he made a full disclosure in regard to the acts of Warner. The court have heard his evidence, and there seems to be no doubt that the disclosures made by the witness were true. He implicated himself, being the driver of the mail stage, but he was instigated to do the act by Warner, who was a much older and more experienced person. The court think that Lee, as a witness, has acted in good faith, and that the acquittal of Warner by the jury, in no respect affects the right of the witness to claim an exemption. The government is bound in honor, under the circumstances, to carry out the understand-

ing or arrangement, by which the witness testified, and admitted, in so doing, his own turpitude. Public policy and the great ends of justice require this of the court.

If the district attorney shall fail to enter a *nolle prosequi* on the indictment against Lee, the court will continue the cause until an application can be made for a pardon. The court would suggest that to discontinue the prosecution is the shorter and better mode.

UNITED STATES v. WOODRUFF.

A jury being called, the counsel for the defendant objected, on the ground that the jury had not been selected as the act of Congress requires.

That act requires, in the selection of jurors, that the State practice, as near as may be, shall be followed.

It was held, that the defendant had a right to claim the selection of jurors according to law, and on that ground his cause was continued.

And the court adopted a rule, that at a proper time before each term, names of suitable persons for jurors should be selected throughout the State, put into a box, and a sufficient number drawn out, and inserted in the venire as jurors.

Mr. Gregg, District Attorney.

Mr. Butterfield for defendant.

OPINION OF THE COURT.

Mr. BUTTERFIELD appeared for the defendant, and the cause being called, objected to a trial, on the ground that the jurors had not been summoned conformably to the act of Congress of the 20th of July, 1840. That act required the jurors to be selected as jurors were selected under the State laws.

By an early rule of this court, the "clerk is required to issue a *venire facias*, commanding the marshal to summon twenty-four persons to serve as traverse jurors."

By the act of 24th of September, 1789, sec. 29, it was provided, "that jurors in all cases to serve in the courts of the United States, shall be designated by lot or otherwise in each

Ross, Administrator, v. Prentiss, late Marshal.

State respectively, according to the mode of forming juries therein now practiced, so far as the laws of the same shall render such design practicable by the courts or marshals of the United States," etc.

As that law applied only to States then organized, other laws have been passed as applicable to the States subsequently admitted. That was the object of the act of 1840.

By the act of Illinois, of the 3d of March, 1845, for the selection of jurors, it is made the duty of the county commissioners to select the jurors. Now, this court can not call upon any officers of the State to perform this duty, but we are bound to conform as nearly as may be to the State practice. The venire under the above rules, leaves the selections of jurors to the marshal, as his convenience shall permit. This does not, therefore, conform to the State practice.

The jurisdiction of this court extends throughout the State, consequently the jurors should be selected from the State at large, and their names should be inserted in the venire. The court will, therefore, adopt a rule requiring the clerk and marshal to select the jurors from the State at large, previous to each term, and to conform in doing so, as near to the State practice as may be practicable.

As the defendant is entitled to a jury selected under the laws of Congress, which, as far as may be, adopts the laws of the State, we think, for the reasons stated, he is entitled to a continuance of the cause.

ROSS, ADMINISTRATOR, v. PRENTISS, LATE MARSHAL.

A bill of review will lie for errors in law, or on the ground of newly discovered evidence.

On the latter ground, the bill is filed by leave of the court. On the former, it is filed without leave.

In Illinois, a deed takes effect from the time it is filed for record.

And all conveyances are void against creditors, which are not so filed.

The United States are creditors within the law, against a delinquent postmaster and his sureties, against whom a judgment has been entered.

And on this ground the conveyance of property, the deed not having been left for record, until after the defalcation occurred, was declared void.

Mr. McDougal for the complainant.

Mr. Butterfield for the defendant.

OPINION OF THE COURT.

THIS bill is brought to review a decree lately pronounced in this court.

On the 6th of June, 1838, the United States obtained a judgment in this court for six hundred dollars damages and costs, against John S. C. Hagan and Gholson Kercheval, upon the official bond of the said Hagan, as postmaster at Chicago. An execution was issued on the judgment, upon which Prentiss, the marshal, levied upon a lot of ground in Chicago. And the complainant filed a bill in this court for an injunction, to restrain the marshal from selling the property. An injunction was granted, which, on the final hearing, was dissolved, and the bill dismissed at the costs of the complainant.

It is the object of this bill to review and reverse the above decree for errors apparent upon its face.

There are two grounds upon which a bill of review may be filed. One for errors in law, the other for errors in fact, founded upon newly discovered evidence. The latter can only be filed with the leave of the court. The former is filed without leave. In England, on a bill of review, the court look only at the decree which embodies the facts, and those facts can not be controverted; but in this country, the decree, generally, by reference to the proof, makes the facts a part of the decree, and they are examinable, as to questions of law arising thereon.

There is a demurrer to this bill of review, which brings before us the questions of law only, which arise upon the statements in the bill.

Ross, Administrator, v. Prentiss, late Marshal.

It appears that in April, 1836, G. S. Hubbard purchased from Kercheval the lot levied on, for ten thousand dollars, one-half of which was alleged to have been paid at the time of the purchase, and the residue was paid within the year. That he took immediate possession, which he and his mortgagor have held ever since. That the legal title remained in Kercheval until the 25th September, 1837, when, at the request of Hubbard, he conveyed the lot to Daniel S. Griswold. That on the 1st of November, 1838, Griswold conveyed the same to Hubbard. Both of the above deeds were recorded on the 20th of April, 1839. On the 30th of April, 1839, Kercheval conveyed the same lot to G. S. Hubbard, which deed was recorded the 11th of April, 1839.

On the 29th of August, 1838, Hubbard mortgaged the lot to Pratt, to secure the payment of \$12,075 39. This mortgage was recorded the 30th of September, 1838.

Gholson Kercheval became one of the securities of Hagan, as postmaster, on the 28th of November, 1832. That at the time of the pretended purchase of the lot by Hubbard, Hagan, as principal, and Kercheval, as security, were indebted to the United States on said official bond the sum of \$2,357 51, and a judgment was recovered, as above stated, against them, on the bond, the 6th of June, 1838. That the United States, from the above, were the creditors of Hagan and Kercheval.

By the act of January 31st, 1827, all conveyances of real estate are required to be recorded within twelve months. And by the act of January 18th, 1833, after the 1st of August, 1833, all deeds and title papers shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors, and subsequent purchasers without notice. And all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until they shall be filed for record.

From the above facts it appears that on the 6th of June,

1838, a judgment was obtained by the United States against Hagan and Kercheval, for a debt due in April, 1836. That Kercheval gave no deed, that was recorded, until the 20th of April, 1839. The judgment was entered not only before any deed for the lot from Kercheval was recorded, but before the mortgage from Hubbard to Pratt was executed. The note, secured by the mortgage, was dated 29th August, 1838.

The above act, which declares deeds void, as to creditors, where the deed has not been left for record, was in full force; and it would seem must apply to the United States, who were creditors within the meaning of the act. Notice does not apply to creditors, but to purchasers only. The case of *Robinson v. Ruman*, 2 Scam., 499, seems to decide this question.

When Hubbard executed the mortgage, he had no legal title. Independently of the statute, there would seem to be a strong presumption of fraud, in the conveyance of this property; from the circumstances in which the parties were placed, and the manner in which the several deeds were executed. From the facts, the inference is justified that the object was to place the property beyond the reach of the government. Why were the deeds so long withheld from record, if the transaction was a fair and open one? Why was the conveyance made by Kercheval to Griswold, at the request of Hubbard, and who afterward conveyed to Hubbard?

But it is unnecessary to place the conveyance on the general ground of fraud. We think it is within the statute, and that makes the deed fraudulent against the United States.

In looking into the decree sought to be reviewed and reversed by this bill of review, we see no error, but on the contrary think now, as we did when the decree was entered, that it is just, and sustainable upon the principles of a court of equity.

This bill is therefore dismissed, at the costs of the complainant.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN.—JUNE TERM, 1846.

P. LATIMER v. MOORE, MATTESON AND BARNUM.

A personal decree will be made against the heir for an annuity charged on the land.

A tenant for life is bound to keep down the interest of incumbrances, although the whole of the rents are exhausted by it.

A court will sometimes appoint a receiver to pay the annual charges on the mortgaged premises.

The above principles will be applied, if the land under incumbrances shall not sell for the debt secured by the mortgage.

Decree, etc.

Hr. *Seaman* for complainant.

OPINION OF THE COURT.

THIS bill was filed to foreclose a mortgage given on certain lots in the village of Cassopolis, in the county of Cass, Michigan, to secure the payment of two promissory notes, each for the sum of four hundred and fifty dollars.

In the bill, Barnum is represented to be in possession of the premises, under some claim, as purchaser or otherwise, the particulars of which are unknown to the complainant, except that the interest or title claimed, is derived from Wood and Matteson, and that is subject to the mortgage. And the bill prays the defendants may answer, etc. And that an account may be taken, and that so much of the mortgaged premises may be sold as shall be necessary to pay the principal and interest due, and the costs, etc.

Barnum having had possession of the premises, the complainant contends that he must account for the rents and profits.

Lands sold to A. subject to an annuity of £15 a year, to the sister of the vendor. The lands are afterwards mortgaged and otherwise charged by A., and thus charged descend to his heir at law, a court of equity will make a personal decree against the heir for the arrears and growing payments of this annuity. *Champervorne v. Hallersden*, 4 Brown, P. C. 630; 1 Mer. 240; 1 Chitt. Eq. Cases, 690.

A tenant for life is bound to keep down the interest of incumbrances, although the whole of the rents are exhausted by it. *Reeves v. Watkinson*, 1 Ves. 93; 1 Chitt. Eq. Cases, 380.

The heir at law can oblige tenant by the courtesy, to keep down the interest, as any other tenant. 1 Atk. 606; *Cosborne v. Scarfe*, 1 Chitt. 380.

The court will sometimes appoint a receiver to receive the rents of the mortgaged premises, who will be required to pay the interest and the annual charges upon the land. Story's Eq. sec. 838; 5 Madd. 422; 6 Ib. 11; 3 John. Ch. Rep. 259.

The mortgage debt always forms a part of the purchase money, on the purchase of the mortgagor's equity of redemption. 3 John. Ch. Rep. 261.

The above principles may be applied, if it shall be found that the mortgaged premises are insufficient to pay the sum due, etc. The court having referred, etc., to a master, whose report is before us, will decree a foreclosure and sale of the premises.

Hatch v. Dorr and Rendrick.

HATCH v. DORR AND RENDRICK.

A creditor's bill, is a continuation of the suit at law, as it merely seeks to obtain the fruits of the judgment, or to remove obstacles to the remedy at law.

In such a case, a change of residence of the complainant to the State of Michigan does not oust the jurisdiction of this court.

Mr. *Abbott* for complainant.

Messrs. *Joy* and *Porter* for defendants.

OPINION OF THE COURT.

THIS is a creditor's bill for discovery, filed upon a judgment obtained in this court in January, 1845, against Dorr; and an execution having been issued on the judgment, was returned *nulla bona*. The bill is filed in aid of the execution; S. N. Rendrick is made a defendant, as the trustee of Dorr.

The complainant was a citizen of the State of New York at the time the suit at law was commenced, but before the return of the execution by the marshal, he removed into this State.

To the bill there is a general demurrer, which assigns for cause of demurrer, that the court has not jurisdiction of the case, as the complainant abandoned his citizenship in New York, and is now a resident of Michigan, where the defendant resides.

This is not an original suit. "Original bills are those which relate to some matter not before litigated in the court, by the same persons, standing in the same interests." "Bills not original are those which relate to some matter already litigated in the court by the same persons, and which are an addition to or continuance of an original bill, or both."

According to this definition, a creditor's bill is the continuation of the former controversy, so far as the fruits of the judgment are concerned. The complainant asks the aid of the court to reach the assets of the defendant so as to be

made liable to his judgment, which assets have been secreted or fraudulently assigned to defeat the judgment.

An injunction bill is said not to be an original bill, as it sets up some matter of equity against the plaintiff's claim, of which he could not avail himself at law. In that case, as in this, equitable considerations are inquired into in the one case, to carry the judgment into effect, and in the other to prevent the plaintiff from availing himself unjustly, of a legal advantage.

If the case before us be not an original suit, but the extension of a former controversy, the change of residence by the plaintiff, can not affect the jurisdiction of the court. 8 Peters' Rep. 1; 2 Wheat. 290; 4 Mason, 360; 5 Cranch, 288.

It is well settled, that where jurisdiction of the court has once attached, no change of residence by the parties will oust that jurisdiction.

UNITED STATES v. BABCOCK.

Where a clerk of a circuit court administers an oath as to the travel of a witness, which is not required by law, nor by a rule of court, it is not false swearing, under the act of Congress.

The oath must be required by law, or by usage, sanctioned by the court, or the department of the government, to make it perjury.

The act of Congress applies to oaths made in behalf of claims against one of the departments of the government.

A ministerial officer can not institute a usage, which shall bring a case within the law.

A voluntary or extra-judicial oath is not perjury.

The indictment should charge that the oath was false, and known to be so by the witness.

Also, the motive must be stated in the indictment to be corrupt, or words equivalent.

Mr. *Norvell*, District Attorney, United States.

Mr. *Bates* for defendant.

OPINION OF THE COURT.

THIS is an indictment for perjury. The defendant is charged with having been duly summoned as a witness in the case of the *United States v. John Allen*, then pending in this court. That by his attendance he became entitled to five cents mileage in coming to and returning from the place of holding court. And the indictment charges, that in order to substantiate his claim against the United States for said mileage, and to procure payment therefor, he appeared before John Winder, clerk of this court, and then and there made his corporal oath, and answered to the question put to him by said clerk, that the distance from his place of abode to this court, was one hundred and seventy miles, whereas it was a much less distance, being ninety-two miles, etc.

The indictment also charges that the defendant deceitfully and fraudulently, intending to defraud the United States by claiming and obtaining a larger amount of money than he was entitled to as a witness in the said cause, he did of his own wicked and corrupt mind, falsely swear as aforesaid in support of his said claim against the United States, etc. Other counts varied somewhat the charge, but not altering the allegations, substantially, as above stated.

There was a general demurrer filed to the indictment, on the ground that the indictment charges no offense against the laws of the United States.

In the 13th section of the act of Congress of the 3d of March, 1825, it is declared, "If any person, in any case, matter, hearing, or other proceeding, when on oath or affirmation, shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willfully swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, upon conviction thereof, be punished by fine, not exceeding two thousand

dollars, and by imprisonment and confinement to hard labor, not exceeding five years."

The oath in this case, as charged in the indictment, was not taken under any law of the United States: and this is necessary to bring the charge within the above act. The courts of the United States have no criminal jurisdiction, except that which is given to them by the laws of the United States. They can not punish common law offenses. In a criminal case, the defendant is entitled to a strict construction of the law under which he is arraigned, and he can not be punished unless he is clearly within the law.

But it is insisted that the offense comes under the 3d section of the act of the 1st of March, 1823. It reads, "If any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for willful and corrupt perjury."

The objection to this law is, that it refers, exclusively, to claims made against the United States, through one of the departments of the government. The first part of the section refers to the disbursements or expenditures of public money; the second, where an individual swears in support of any claim against the United States.

There can be little doubt that this section was intended to apply to the authentication of claims made to one of the departments. It is connected with the expenditures of public money, and was designed to protect the treasury from false oaths, in regard to such expenditures. But is the provision limited to such applications? May it not be held to embrace the present case?

The oath was not required to be administered by any law of the United States, nor any rule of the court. It was a usage introduced by the clerk, in ascertaining the mileage that witnesses were entitled to claim.

There can be no doubt that the clerk, in the presence of

the court, or any other person acting under the sanction of the court, is authorized to administer oaths. It is the act of the court, in such a case, and not an act done by the authority of the individual who administered the oath. But where the clerk, out of court, in the ordinary performance of his duties, thinks proper to administer oaths, for his own convenience or security, which are not required by the law or an order of court, it is exceedingly doubtful whether such a swearing is within the above section.

The claim, in one sense, is against the United States, as the United States were a party to the suit, and the indictment avers that the claim was against them. But the oath was, substantially, only before the clerk, no record being made of it. The fact sworn to, conduced to fix the amount of compensation for traveling, as it established the distance, on which mileage was allowed. Had the law required this oath to be taken, or had it been required by an order of court, we should have had great difficulty in saying it was not perjury or false swearing, within one of the above sections. If the taking of the oath may be called a usage, it is the usage of the clerk, and not of the court. And it seems to be more than doubtful, whether an officer of the court, without any higher authority, should institute a usage which, to individuals, might be attended with consequences so serious.

An extra judicial oath, lays no foundation for a prosecution of perjury. Indeed, the policy of multiplying oaths, is questioned by persons of the most enlarged experience. Make anything common, of this nature, and the solemnity which it would otherwise impart, is, measurably, lost. Custom house oaths, in all countries, have become a proverb and a reproach, and tend but little to secure the public against frauds.

The clerk, by a rule of court, may be authorized to administer oaths. But in what cases? Surely not in all cases where he may deem expedient. In performing that duty, he

must act under the authority of law, or under the orders of the court. He is a mere ministerial officer, and must, consequently, act under authority.

The indictment seems to be defective in not averring that the oath was willfully, knowingly, and corruptly taken, knowing it to be false, or words of the same import. If the affiant swore falsely, through ignorance as to the distance in this case, he was not guilty. We do not say, that under either of the sections cited, the indictment must charge the offense with all the technical accuracy as in an indictment for perjury. But the averments must show that the defendant knew that he swore falsely, and that his motive was corrupt.

Upon the whole, the demurrer is sustained, and the defendant is discharged from custody.

MARTIN v. KERCHEVAL AND FORSYTHE.

A note in the hands of an assignee is *prima facie* evidence of the amount of the consideration paid by the assignee.

But the assignor, when sued, may prove what was paid.

This evidence can not be set up by the maker of the note, in the hands of a *bona fide* holder.

If the payee of the note paid no consideration, and the assignee paid none, the maker may show a want of consideration.

Messrs. *Douglass* and *Duffield* for plaintiff.

Mr. *Bates* for defendants.

OPINION OF THE COURT.

THIS action is brought by the plaintiff, as indorsee against the defendants as indorsers, of a promissory note. A judgment was obtained against the maker of the note by the "Bank of Michigan," to whom the note was assigned in 1841. After this the counsel, Mr. Douglass, says he filled up the

blank indorsement against the defendants. Notice to the defendants was proved to have been duly given by the bank.

A question is made whether, as between the indorser and indorsee, the consideration can be proved? The face of the note is *prima facie* evidence of the consideration paid on its negotiation. But this is only *prima facie*. The defendants may show an entire want of consideration, or that a small sum only was paid. This evidence could not be given by the maker. For he is bound to pay the face of the note, at whatever discount it may have been purchased by the holder.

When a note has been reduced to judgment, its negotiability ceases; but questions may arise between the other parties to the note, if the maker becomes insolvent.

If, indeed, the note was given without consideration, and was indorsed by the payee without consideration, the maker would not be precluded from showing these facts, by way of defense, to a suit brought by the assignee. But where the note, in the ordinary course of business, has been negotiated for a valuable consideration, the maker is bound for the face of the note.

It is alleged that the plaintiff has no interest in the note, and consequently can not maintain this action. The indorsement shows that his name is on the note, and the filling up makes him the legal holder of it. The indorsement having been made long before the judgment against the maker, it was a promise to pay the holder of the paper, who had a right to fill up the blank at any time, provided that legal steps were taken against the maker. This was the only condition of liability by the defendants, to any subsequent *bona fide* holder of the note.

The presumption is in favor of the holder, and that the filling up related back to the time of the indorsement. But no hardship is imposed on the defendants, as they are permitted to go into the consideration between them and the plaintiff.

The jury found a verdict for the plaintiff, on which a judgment was entered.

THE UNITED STATES v. TEN EYK.

A marshal who in taking the census advances money to pay the expense, after repeated attempts to obtain it from the proper department, may retain the amount thus paid, of the public money, in his hands.

And this may be done although the government has paid the deputies a second time, it having had previous notice of the payment by the marshal.

These facts being found by the jury, they found, under the instructions of the court, a verdict for the defendant, who was sued, as late marshal.

Mr. *Bates*, District Attorney.

Mr. *Romeyn* for defendant.

OPINION OF THE COURT.

THIS action is brought by the United States against the defendant, as late marshal, to recover a balance of public money alleged to be in his hands.

From the evidence, it appears that while the defendant was marshal, the census was taken. He appointed his deputies, and the work was completed. But the government made no advance to him on that account. He raised the money and paid the deputies, of which he informed the government. Until he had made repeated efforts to obtain the money from the government, he did not borrow to pay his deputies.

The defendant was removed from office, and his successor was appointed, who, although notified of the payments made by the defendant, went on under the instructions of the department to pay the deputies over again.

There was nothing made to appear that the late marshal had acted unfairly or improperly, in the discharge of his

duties. If he was at all censurable, it was for indulging in a higher solicitude for the public service, and for the compensation of men who had labored for the government, than appears to have been felt by his superiors at Washington. The instructions to pay the deputies, who had been paid by the late marshal, of which the department had notice, were reprehensible.

The court instructed the jury, that if the payments were made to the deputies who took the census, by the defendant, and the government, as well as his successor, had notice of such payments, it was the duty of the government to see that no more than was due, was paid to the deputies.

The jury found for the defendant.

THE FARMERS' TRUST AND CANAL BANK v. KETCHUM ET AL.

A counsel has power to enter into a stipulation in a suit wherein he is employed.

And there being no unfairness, or charge of impropriety, the court will not, on motion, set aside the agreement.

The counsel not only appeared in the case, but made an affidavit that he was employed.

Mr. Barstow for complainants.

Mr. Romeyn for defendants.

OPINION OF THE COURT.

By consent of parties, and on a stipulation made by the counsel on both sides, a decree was entered on which the mortgaged premises were sold. At a subsequent period, a bill of review was filed, alleging, as ground of error, apparent on the face of the decree, that the court had not jurisdiction, as between the parties on the record, to wit, that one of

the complainants, The Farmers' Loan and Trust Company, is of the same State as the President and Directors of the company of the Canal Bank, who are made defendants. On this ground the decree was reversed and annulled; and the court gave leave to amend the bill, by making the Canal Company Bank a co-complainant, instead of defendant. And now a motion is made to set aside the former stipulation on the grounds,

1. That it was made before the reversal of the decree, when the parties to the record stood in a different relation to each other from the one they now bear, since the amendment.

2. Because Mr. Romeyn, the counsel for the Canal Bank, was not authorized to make the stipulation.

If Romeyn was counsel, he had power to make the stipulation. If set aside, it must be on the ground of unfairness or mistake, or on account of the changed relations of the parties.

The Canal Bank is now a co-complainant instead of being a co-defendant. This change does not compromit or change the rights of the parties. If all the parties in interest are before the court, the court can decree in accordance with their interests. It is not unfrequent in such cases to decree that party defendants, or complainants, shall release or pay to each other, as their equities shall require. The rights, therefore, of the Canal Bank not being compromited by the amendment of the bill, no reason is perceived on this ground to set aside the stipulation.

Mr. Romeyn swears that he was counsel, and the court, under the circumstances, are bound to consider him as such. There is no allegation of unfairness, or professional impropriety in entering into the stipulation. The court will, therefore, overrule the motion.

Afterward, another and somewhat different arrangement was made by the parties.

ASSIGNEE OF BRAINARD AND GEOFFRAY v. WILLIAMS.

The 11th sec. of the judiciary act of 1789 declares that jurisdiction may be exercised by the circuit court, between citizens of different States. But, in the same section, there is an exception, that where suit is brought in favor of an assignee, there shall be no jurisdiction, unless suit could have been brought in the courts of the United States, on such notes, had no assignment been made.

This is a restriction on the provision of the 2d sec. of the 3d article of the constitution, which declares that jurisdiction shall be exercised between citizens of different States.

And yet, this provision has been sustained by the Supreme Court since its organization.

It is said that the courts can only take jurisdiction under an act of Congress.

There are important exceptions to this, as a suit between two States in relation to boundary.

This part of the act should have been declared to be unconstitutional.

Congress might have provided against fraudulent assignments to give jurisdiction.

The declaration sufficiently shows that the assignment was made at the date of the note, in the State of New York.

Messrs. *Barstow* and *Lockwood* for plaintiffs.

Mr. *Romeyn* for defendant.

OPINION OF THE COURT.

THIS action is brought on a bill of exchange, a promissory note, and the general counts are added.

The defendant's counsel demurs to the three first counts in the declaration, on the ground that it does not appear that the assignor to the plaintiff of the note in controversy was, at the time of the assignment, a citizen of another State. The declaration, it is said, states the citizenship of the plaintiff and his assignor, at the time of the commencement of the suit, to have been such as to give the court jurisdiction. But it is contended it must appear that at the time of the assignment, the assignor could have sued in the courts of the United States. That from any thing which appears on the face of the declaration, the assignor may have made the assignment in this State, and afterward removed to New York. And it

is insisted that where suit is brought in this court on an assigned note, it must appear, that at the time of the assignment, the assignor could have brought suit in this court. That no change of residence after the assignment, any more than a change of residence in the plaintiff, after the commencement of suit in this court, could affect its jurisdiction.

The words of the 11th sec. of the judiciary act of 1789 are, the jurisdiction of the circuit court shall attach where "the suit is between a citizen of the State where the suit is brought, and a citizen of another State." This clearly refers to the time of bringing the action. But the words of exception are, "nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of any assignee, unless a suit might have been prosecuted in such court, to recover the said contents if no assignment had been made."

The 2d sec. of the 3d article of the constitution declares, that the judicial power shall extend to controversies "between citizens of different States," and yet the above exception in the act of 1789, imposes a restriction upon this provision, by declaring, that jurisdiction shall not be exercised between citizens of different States, unless the person from whom the cause of action was assigned, could also, from his citizenship, sue in this court. A clearer and more palpable infraction of this constitutional provision could not be well imagined, and yet the law has been sustained from the organization of the Supreme Court.

The only answer to this argument that has been attempted, is, that the jurisdiction is given to the courts of the United States by Congress, and that they can not exercise jurisdiction, except in certain cases, under the constitution. It is often said that a bad reason is better than none; but this can scarcely come under that denomination. If Congress in attempting to carry out the provisions of the constitution,

shall repudiate a part of its provisions, it is the duty of the Supreme Court to declare such legislation void.

In a most important controversy between States, in regard to a disputed boundary, the Supreme Court, on solemn argument, decided that they could take jurisdiction under the constitution, by serving a notice under their own rule, on the governor and attorney general of the State, and decide the question of boundary and consequent exercise of sovereignty over it, without the legislation of Congress. Had Congress provided against fraudulent assignments to bring cases in this court, it would have been a proper provision.

The first two counts in the declaration, which the demurrer includes, are founded upon a foreign bill of exchange, which is excepted from the operation of the statute; of course there can be no objection to the jurisdiction in regard to those counts.

And, in reference to the third count, it states that the defendant made a certain note in writing, at New York, etc., and delivered the same "to certain persons using the style and firm of Brainard and Geoffray, who are citizens of the State of New York." The time the note was executed is averred to have been the twenty-second day of July, 1845, and the indorsement of the note is averred to have been made "on the same day and year, and at the place aforesaid." From these averments it appears that the note was executed at New York, the 22d July, 1845, and made payable to a firm in New York, who, on the same day, and at the same place, assigned the note to the plaintiff. We think there is enough in the declaration to sustain the jurisdiction of the court.

The demurrer, therefore, is overruled, and judgment.

JAMES M. BERGEN v. G. D. WILLIAMS.

A judgment being entered, on the penalty of a bond, to save harmless the creditors of a certain firm, by paying the amount due, or to become due, may be enforced by *sci. fa.* on the judgment, to show cause why execution should not issue, etc.

A judgment against the late firm is conclusive as to the amount due.

A set off of notes subsequently acquired by the surety in the bond, can not be pleaded as an offset against the creditors' demand.

Nor is a plea of *nil debit* admissible after the creditors have obtained judgment against the late firm.

The condition of the bond was, that the obligors should pay the creditors, and not one of the late firm.

Under the plea of *nil tuel record*, the judgment only is put in issue.

Messrs. *Fraser and Davidson* for plaintiff.

Mr. *Douglass* for defendant.

OPINION OF THE COURT.

THIS is a proceeding by *scire facias*, to obtain execution for further breaches in debt on a bond.

At June term, 1841, a judgment was entered in favor of Bergen, against Williams, for twenty thousand dollars, and an award of execution for \$977 14, the amount ascertained to be equitably due to Bergen when the judgment was rendered. The judgment was entered for the penalty of the bond, which was given on the 9th of August, 1830, jointly, by Williams and William Stevens, "conditioned that Stevens should pay, discharge, and liquidate, all the debts, engagements and liabilities, of every kind, and all the demands, of whatsoever nature, contracted by the firm of Bergen and Stevens, then due or thereafter to become due, against the said firm, without recourse to the plaintiff, and should well and truly save harmless and keep indemnified the said Bergen and his representatives therefrom," etc.

In the *sci. fa.* it is averred that at the time the bond was executed, the co-partnership of Bergen and Stevens was

indebted to ———, in ———, a certain sum, on which suit was instituted and judgment recovered, stating the amount of the judgment for ———, which remains in full force, etc.

The defendant pleads a set-off, that at the time of suing out the *scire facias*, the plaintiff was indebted to him in the amount of certain promissory notes, made by the plaintiff, payable to different individuals, by whom they were indorsed to defendant.

The defendant also pleaded that the partnership of Bergen and Stevens was not, at the time the penal bond was executed, indebted in the said sums demanded by the plaintiff, etc. Both of these pleas were demurred to, and joinder.

The demurrer raises the question whether, on a *sci. fa.* to obtain execution for further breaches of the condition of a bond, judgment having been entered for the penalty, the defendant can set off a demand against the plaintiff.

In answer to the objection that the *sci. fa.* is an action upon the judgment, and that in an action upon a judgment, no defense can be set up which might have been pleaded to the original action. Also, that the notes set forth in the plea and notice of set-off having matured since the judgment for the penalty, the defendant is prevented from using them as a set-off by the statute, "which provides that no demand shall be set off unless it existed at the time of the commencement of the suit." Rev. Stat. 447, sec. 4. The defendant's counsel contends that the *sci. fa.* for further breaches, is to all intents and purposes, and within the meaning of the statute above cited, an original action.

Whether this procedure for the purposes of set off, may be considered as an original action under the statute, is not necessarily a question in this case. There is a question behind that, which is decisive of the plea or notice.

As stated in the *scire facias*, this proceeding is had at the instance of certain judgment creditors of the firm of Bergen and Stevens. The name of Bergen is used as a trustee; but

the suit is for the benefit of the above creditors. The condition of the bond is, that the defendant shall pay those creditors, so as to save harmless the said Bergen, not only from the debt, but from all costs and charges. An attempt, then, to plead offset against Bergen, arising on promissory notes acquired since the original judgment, is in direct conflict with the condition of the bond. The condition is, to pay the creditors, and not Bergen; and the creditors prosecute this suit for their benefit. This interest of the creditors, arising under the original judgment, would be recognized and enforced, if necessary, by a court of chancery. And a court of law will also protect and enforce their rights, in the name of Bergen.

The issue is between the creditors and the defendant, and as they have reduced their claims to judgment, an offset against them could not be allowed, at least so far as Stevens is concerned, with whom the defendant Williams is jointly liable. It need not now be said, whether Williams, being a stranger to the judgment in favor of the creditors, might not be allowed to set up a defense, which would not be proper for Stevens, who was a party to the judgment, because no such question is raised.

Under the plea of *nul tiel record*, the record of the judgment only can be examined. If the defendant had notice, and judgment for the amount stated was rendered, no other question can be considered under that plea.

The plea that the co-partnership of Bergen and Stevens did not owe at the time the bond was executed, is subject to two objections:

1. The bond obligated the defendant, jointly with Stevens, not only to pay the debts of the firm, then due, but also those that should thereafter become due.

2. *Nul debit* can not be pleaded to a judgment. The judgment closes the controversy, and it is indisputable, so long as it remains in force.

The demurrers to both pleas are sustained. On motion and affidavit of defendant, the order for execution was set aside, and leave to plead, granted.

ALLEN v. KING.

Taking a note is no discharge of a pre-existing debt, unless there be an agreement to that effect.

The taking of such note from the indorser, imposes an obligation on the holder to demand payment when the money is due, and give notice of non-payment. If he fail in this, he makes the note his own.

A mere agent is responsible for the damages incurred, when he fails to make demand and give notice.

Where a note was received, the proceeds to be applied in discharge of a debt, if demand be not made and notice given to the indorser at the proper time, so as to charge him, he makes the note his own, in discharge of the debt.

Where there are no effects in the hands of the drawee, the holder may be excused, as against the drawer, from making demand and giving notice.

But in such case, it must appear that the drawer had no right to expect the draft would be accepted and paid.

Messrs. *Joy and Porter* for the plaintiff.

Mr. *Fraser* for defendant.

OPINION OF THE COURT.

THIS action was brought to recover a balance which the defendant owes to the plaintiff, for goods, wares, and merchandize, purchased. A draft, payable in four months, drawn by Harleston, on N. G. Ogden, of New York, and indorsed by King, was procured by King and handed to the counsel of the plaintiff, with the view of paying, when the proceeds should be received, so much on account. This draft was forwarded and accepted, but was eventually protested for non-payment. It seems that due notice was not given to the drawer and indorser, and that was made the principal ground of defense. The trial took place in the absence of the circuit judge, and now a motion is made for a new trial, on points

stated, before a full court. The jury found for the defendant.

A new trial is asked—

1. Because the court rejected Harleston, the drawer of the draft, who was offered as a witness, to show that the remedy against him has not been lost, as the drawer of the bill, for want of strict notice.

2. Because the jury were instructed that it was incumbent on the plaintiff to prove that the draft had been presented for payment at maturity, at the place where payable, and that it had been regularly protested for non-payment, and notice to the drawer and indorser given.

3. Because, in the instruction, a decision in 2 Washington's Rep. 191, 157, was not followed, on which the plaintiff relied.

4. Because the court refused to charge the jury, upon the request of plaintiff's counsel, that unless the jury are satisfied, from the testimony, there was an express agreement by the plaintiff to take the thousand dollars' draft in payment, and at his own risk; that the plaintiff was but the agent of King, for the collection of said draft; and that the draft remained his property, and at his risk; and that although the draft was not presented for payment, at maturity, and no notice of non-payment given, yet that constitutes no defense to this action.

5. That if the draft was not taken in payment, although no notice was given, if thereby the amount of the draft, or any part were lost, by reason of such neglect, it was a ground of action for damages he thereby sustained, against the plaintiff, by the defendant.

6. Because the court charged the jury that by failing to make the demand and give notice, the plaintiff made the bill his own, and that the remedy against the defendant upon the open account, was consequently lost.

Other causes were assigned, but which are substantially embraced in those above stated.

There can be no doubt, that where a bill has been received payable on time, that it is no discharge of a pre-existing debt, unless there be an agreement to that effect. Nor would a draft payable on presentation, be a payment, unless it was agreed to be so received. Until the money on a bill is paid, it is at the risk of the drawer and the holder of the bill, whether he be entitled to the money, or a mere agent for the drawer, he is bound to make the demand, and give notice of non-payment, and if he fail he will, in many cases, be responsible to the drawer or indorser for damages.

The damages are not to be estimated by the face of the bill, in regard to the drawer, he having no effects in the hands of the drawee, but by the actual damages suffered by him. It is true, when the holder of a bill, regularly negotiated, neglects to make a demand at its maturity, and give notice, he loses his recourse against the names on the bill, who are entitled to notice.

There is no evidence to show that the bill in question was taken in payment. It must then have been received, for the purpose of applying the proceeds when paid, to the payment of the balance due by the defendant to the plaintiff. 8 John. 389; 5 John. 69; 5 Wend. 492; 9 John. 310; 1 Cowen, 306; 4 Mason, 248.

If it be agreed to receive the bill in payment, the rule is different. 5 John. 69; 3 Cowen, 303; 3 Wend. 344; 10 Peters, 532.

In all cases, the plaintiff may produce the note at the trial to be cancelled. 10 John. 104; 15 John. 249; 8 Cowen, 80. And the court will require the bill to be produced.

The holder of the bill, being an agent merely, is not considered a party to it. As, where a bill is forwarded to a bank for collection, and demand or notice is neglected, the bank is responsible only for the damages sustained, and they are to be ascertained by a jury. The same principle, it is contended, applies where a bill is received, the proceeds of which,

when received, are to discharge a debt. Until the proceeds shall be received, the risk is the drawer's, and if there be a failure, the agent is responsible to the extent of the damages suffered. This, it is argued, is under the law of agency. Story on Agency, 217; 20 John. 384; 3 Cowen, 662.

"The drawer of a bill, or the indorser of a note, is not discharged by the omission of the holder to make presentment or demand, or to give notice of non-acceptance or non-payment, where it is clearly shown that he has sustained no damages in consequence of such omission." *Commercial Bank of Albany v. Hughes*, 17 Wend. 94.

Where this duty of an agent has been neglected, damages are presumed, but this presumption is rebutted by proof of the entire want of effects in the hands of the drawee continually, from the time of drawing the bill, until and after the day it fell due, and this, under such circumstances, as to show that the drawer had no right to expect payment.

In *Dennis v. Morrice*, 3 Esp. Rep. 158, an action was brought by an indorser against the drawer; it appeared that no notice had been given to the defendant, of non-payment by the acceptor, to excuse which, the plaintiff offered to prove that in fact the defendant had not been prejudiced by the want of such notice. But Lord Kenyon said: the only case in which notice is dispensed with is, where the drawer has no effects in the hands of the drawee.

The rule is, that every person is entitled to notice whose name is on the bill, and who has any recourse against some other person or persons. On this ground it was held by Lord Kenyon, in 1 Pardess, 459, in an action against the indorser of a bill, drawn by Vaughan on Eustace and Holland; it appeared that notice had not been given to defendant, upon which plaintiff offered to show that Vaughan had no effects in the hands of Eustace and Holland; but the court said that the want of effects in the hands of the drawee by the drawer, will not avail the plaintiff, and that the rule extends only to

actions brought against the drawer; the indorser is in all cases entitled to notice, for he has no concern with the accounts between the drawer and the drawee. "The plaintiff then proved a letter from the defendant, acknowledging the debt, and promising to pay, and upon that he had a verdict."

Now, if the plaintiff in this case was strictly a party to the bill, his recourse against King, the indorser, was lost, by not giving him notice. For it seems he has nothing to do with the matter of account, between the drawer and drawee. From the statement of the drawer, there can be no doubt that King had his recourse against the drawer of the bill, who admitted his liability continued. From this, it would seem that he could have had no effects in the hands of Ogden, or any just expectation that any one would honor the bill. But still the question recurs, did the plaintiff, by failing to give notice to the indorser, release him from responsibility. And if he did, can the fact be set up in defense to the present action?

Although the bill was not received by the plaintiff in payment, yet he cannot be treated as a mere agent. The proceeds of the bill, when received, were his, to be applied in part payment of the balance due him. He was the holder of the bill, and neither the drawer nor indorser had a right to withdraw it, nor take any steps in regard to it, which might in the least degree be prejudicial to the interest of the plaintiff. Now this is not the case with a mere agent, who has no interest in the bill, and the owner of it has a right to withdraw it, or appropriate the proceeds of it as may suit his convenience. In this view, it is difficult to distinguish between the rights and duties of the plaintiff in regard to the bill, and those which appertain to the holder who has received the bill in the ordinary course of business. It is his property, and he has a right to negotiate it if he shall choose to do so. He may receive payment of it in property, and make any other disposition of the bill that may be convenient for him.

He is then, more than an agent. He is the holder of the bill, and has recourse against the indorser, on condition of demand and notice. The drawer may be responsible, but the question here is, whether the indorser is responsible, no notice having been given to him of the non-payment of the bill? He was entitled to notice, and the fact, that the drawer still acknowledges himself responsible, does not, as regards the indorser, affect the question. In failing to give the notice, the plaintiff made the bill his own, and his recourse against the indorser is lost. He received the bill, and was bound, by the commercial law, to demand payment, and give notice.

Whatever recourse the plaintiff may have against the drawer, he can have none against the indorser, as such. And if he can not recover in this form, by reason of his negligence, it is a good defense against an action on the original consideration. Had the plaintiff given the notice, he might have had his choice, whether to proceed against the defendant, as indorser, or on the original ground of action.

The evidence of the drawer was rightfully rejected, as his admission of liability on the bill could not affect the rights of the defendant in this action. And this was the object for which the witness was offered.

Upon the whole, the motion for a new trial is overruled.

CORNING AND HORNER v. JUSTUS BURDICK.

An alias execution can not be issued until the return of the first execution.

If such execution should be shown to have been lost or destroyed, the court might order an alias.

When personal property has been levied on, sufficient to satisfy the judgment, it is presumed to be satisfied.

But, if such property, on being sold, should not be sufficient, an alias may issue.

An officer is liable for mal-feasance where he disposes of the property, to the injury of the defendant, without complying with the requisites of the law.

Corning and Horner v. Justus Burdick.

The officer will always be presumed to have done his duty.

The remedy against him is, by an action for a false return.

Mr. *Douglass* for the plaintiffs.

Messrs. *Joy* and *Porter* for defendant.

OPINION OF THE COURT.

THIS is an application for an *alias fi. fa.* Judgment was rendered the 30th of June, 1840. Execution issued, returnable the first Monday in August ensuing. The marshal being compelled by rule and attachment, on motion of plaintiffs, returned the execution that he had made \$1473 68; and that certain property was on hand unsold, for want of bidders. This return being defective and incomplete, subsequent proceedings were had by the plaintiffs, by which the marshal was required to make a corrected return. This he filed January 8th, 1845, showing what property was levied upon, how it was disposed of, the amount of money made, and *nulla bona* as to the residue.

The plaintiffs, it is insisted on, have a right to take out an *alias fi. fa.* as a matter of course, without this special application, under the 90th rule, two years not having elapsed since they were entitled to sue out the same.

No *alias* can issue until the original *fi. fa.* has been completely executed and returned. Graham's Pr., 351; Arch. Pr., 436. There can be no doubt that the first execution must be executed before an *alias* can issue; but it is supposed that if, after executed, the writ should be lost, or by accident destroyed, its return might be dispensed with.

This motion is offered on the ground that the first execution was levied on personal property, sufficient to satisfy the judgment. And this is sworn to by the defendant.

And for the defendant, it is contended that a levy on personal property, sufficient to discharge the debt, is a satisfaction, even though the officer wastes the property, or loses the

money. 5 Dana's Ab., 17, 18; 4 Mass., 402; 1 Salk., 323; 2 Saunders, 47, note 1; 6 Mod., 292; Cowen's and Hill's notes, 1046-7, 1088, 1087.

Where a levy has been made, there can be no *alias fi. fa.* until the goods taken shall be sold, and, especially, where the goods levied on may be sufficient to satisfy the execution. Until the sale shall be made, the execution, by the levy, must be considered as satisfied. And if the property be lost through the negligence of the sheriff or marshal, he is liable to the plaintiff, whose agent he may be considered for the purpose of making the judgment, by a sale of the property. For malfeasance, the officer may also be responsible to the defendant.

In this case, it is alleged that there has been malfeasance, which is alleged to consist in the sale of a very small part of the property at private sale. The marshal is undoubtedly liable to the party injured, if he has disposed of any part of the property levied on, in a way which the law did not authorize.

But the marshal has made his return, that he made the levy on the property, sold it for a certain sum, which leaves a balance on the judgment unsatisfied; and he says there is no other personal property, out of which he can make the residue. And an *alias fi. fa.* is asked by the plaintiff. This return is conclusive, and can not be contradicted. 4 Phil. Ev. 1087-8-9; Harrison's Dig. 2486; Comyn's Dig. (Return 8,) vol. 7, p. 287.

The best evidence of the value of the property, is the sale of it by the officer. On execution, personal property rarely sells for its value, and it would be a new principle, if the plaintiff in the execution should be held responsible for the value of the property, at whatever price it might sell. Misconduct in the officer is not presumed, but must be shown. A failure to comply with the requisites of the law would sub-

Davis v. Davidson, Van Pelt, and Cram.

ject the officer to damages, if the property were sold greatly below its value.

Where the return of the officer is made, as in this case, on the presumption that he has done his duty, the plaintiff may ask for an *alias*. If the defendant has been injured, he has his remedy against the marshal. When a *sci. fa.* is brought to revive a judgment, on which execution has been issued, and levied upon personal property, and remains unreturned, the judgment will be regarded as satisfied. No action can be maintained on a judgment, while there is an outstanding execution levied and unexecuted. It is believed there is no case where the execution had been returned, showing a deficiency of property, that its sufficiency in value might be shown in an action on the judgment, in bar of the execution. The truth of the return can not be thus controverted. This can only be done by an action for a false return.

The motion of the plaintiff for an *alias fi. fa.* is granted.

DAVIS v. DAVIDSON, VAN PELT, AND CRAM.

A joint answer is sufficient, all the parties swearing to it.

Answers to bills are generally drawn jointly and severally.

In a joint answer, each individual is liable to be indicted for perjury, if he swear falsely.

An answer must be signed by counsel, in order that the counsel may be held responsible to the court for the contents of the answer.

If the answer be taken by commissioners, the signature of counsel is not required.

Mr. Lee for complainant.

Mr. Emmens for defendants.

OPINION OF THE COURT.

A motion is made to set aside the answer to a bill in chancery, on two grounds:

1. Because it is the answer of three individuals, and is sworn to by three. In the caption it purports to be the joint answer of the three, but not their several, as well as joint answer; this is erroneous, it is contended, for two reasons: 1st. Because all established precedents require them to be several, as well as joint. And 2d. Because, in case one of the defendants should swear falsely in the answer, he could not be indicted separately for such false swearing upon a joint answer, without joining all the joint respondents.

The precedents are, generally, as stated by the counsel. They are drawn jointly and severally. But we are not prepared to say that this form is indispensable. We see no satisfactory reason why a joint answer, responsive to the bill, would not be sufficient. The reason assigned, that one of the defendants could not be indicted for false swearing, without including the others, is not satisfactory. Each individual, who answers jointly, is responsible for the facts sworn to, the same as if his answer had been separate. And it is not perceived why he might not be indicted, without uniting the other defendants.

The answer is not signed by counsel, which is undoubtedly a defect. Except in certain specified cases, the answer must be signed by counsel. Under peculiar circumstances, the signature of the defendant may be dispensed with; but the signature of the counsel is required, unless the answer is taken by commissioners. The signature is necessary, that the person signing may be responsible to the court for the contents of the answer. Story's Eq. Pl. sec. 876; Mit. Eq. Pl. by Jeremy, 815.

Leave is given to amend the answer.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—JULY TERM, 1846.

LESSEE OF MINER v. McLEAN, ASSIGNEE.

To constitute a legal and valid title to land sold for taxes, the claimant must show that all the substantial requisitions of the law have been complied with.

The county treasurer and collector must return under oath the delinquent lands to the county auditor, or there can be no forfeiture of such lands for non-payment of taxes.

The county auditor is required to make a record of such return, which record can not be altered by parol evidence.

Nor is a transcript from the auditor, essentially differing from the record, admissible as evidence.

Mr. *Stanbery* for plaintiff.

Mr. *Swayne* for defendant.

OPINION OF THE COURT.

THIS ejectment is brought to recover lot 240 in Columbus, which is claimed by the plaintiff under a tax title.

Several transcripts from the county auditor, and auditor of state, were given in evidence, showing the tax charged on the above lot for the years 1841 and 1842; the returns of the same as delinquent, and afterward as forfeited to the State, with the penalty and interest charged, and also the sale of the lot by the State, and the deed given to the purchaser. A deed from the purchaser to the lessor of the plaintiff was also in evidence.

The defendant, as assignee of Nehemiah Gregory, the late owner of the lot, a bankrupt, raised several objections to the

title, some of which will be now considered. And first, it is objected that the delinquent list of 1841 was not signed and sworn to by the county treasurer, as required by the statute.

By the act of 23d March, 1840, the county auditor is required, between the first Monday in June and the 15th day of August, in each year, to make out a duplicate of the taxes assessed in his county, in the manner therein prescribed. This duplicate he is required to deliver to the county treasurer, who is collector of the tax. The 27th section of the same act requires the auditor to "take from the duplicate, after the period for collection has elapsed, previously put into the hands of the treasurer for collection, a list of all such taxes as such treasurer shall have been unable to collect, therein describing the property on which such delinquent taxes are charged, as the same are described in such duplicate, and shall note thereon, in a marginal column, the several reasons assigned by such treasurer why such taxes could not be collected; and such list shall be signed by the treasurer, who shall testify to the correctness thereof, under oath or affirmation, to be administered by the auditor."

The original record, kept by the county auditor, being produced in evidence, shows neither the signing, it is alleged, nor the oath which is required. In the record there is a "return of taxes delinquent for the county of Franklin, for the year 1841," including taxes on both real and personal property. Then follows a statement of a settlement between the county auditor and treasurer, required by the above section, to which is affixed the following: "I, William Long, treasurer and collector of taxes for Franklin county, do solemnly swear that the foregoing list of delinquencies, to the best of my knowledge and belief, are truly stated, and that the reasons for returning such taxes delinquent, as stated therein, do, as I verily believe, truly exist." Signed, "William Long, treasurer and collector for Franklin county."

This is, clearly, neither an oath nor an affirmation, as required by the statute. It is merely the certificate of the treasurer and collector, no oath having, in fact, been administered, as appears from the record. The formal words, "I do solemnly swear," introduced into the certificate, are without effect. The signature, I think, may be considered as a signing within the statute. The objection that the settlement intervenes between the signature and the "list of delinquencies," seems to have but little force.

A transcript from the county auditor of the above duplicate, contains the oath of the treasurer of the county, as required by the statute. But, in this respect, the transcript can not be received as evidence, as it differs from the record. The county auditor is required to make a record of the return of the delinquent lands, by the treasurer and collector of the county; and this record, or a certified copy of it, only, is evidence. Parol evidence is not admissible, to supply a defect in the record. This well-established rule can admit of no relaxation.

Was the oath of the county treasurer and collector, to the return of delinquent lands, essential to the validity of the tax title? In *Lessee of Harmon v. Stockwell*, 9 Ohio, 93, the court say: "The statute, 2 Chase, 1106, sec. 30, requires in terms, that the list of delinquent lands returned to the county auditor during the years 1821, 1822, and 1823, shall be attested by such collector on oath." The oath in that case, not having been administered by proper authority, the court held "that the return of the collector was not under the securities and sanctions which the law required, and that the omission was fatal to a title held under such strict principles as a tax sale;" and in *Lessee of Thompson v. Gotham*, 9 Ohio, 175, the court said: "In order to sustain a title under a sale for taxes, it is not sufficient to produce the collector's deed; there must be evidence to show that the tax has been

levied, that the steps required by law to authorize a sale, have been taken, and that the person making the deed had power to make it."

In the case of *Winder v. Sterling*, 7 Ohio, 192, the collector returned the delinquent list in the same manner as the collector in the case under consideration; and that return was sustained by the court, on the ground that the Legislature had prescribed the form which had been literally followed up by the collector. That form was prescribed by the act of 1825, which was repealed long before the return now in question was made. I should be inclined to think, however, if the act of 1825 were still in force, that an oath was necessary. The form of the oath was given in that act; and because the name of the officer who was to administer the oath was not stated in the form, the court ruled that no oath was necessary—in other words, that the form, and not the substance, was all that the Legislature required.

The act requiring the oath or affirmation of the treasurer and collector, now in force, is substantially the same as the act under which the decision above cited, of *Harmon v. Stockwell*, was made. Of course, that decision must rule the present case.

Whether a greater degree of strictness of procedure is required before the forfeiture of lands than afterward, need not be decided in this case. Until the land forfeited by the State shall be sold, the owner has a right to redeem it; the right, therefore, vested in the State, is not absolute.

Several other grounds were assumed in the defense; but, as the above point is decisive as to this suit, it is not necessary now to decide the other objections to the title.

As to the objection that the duplicates, made out at the auditor of state's office for the county auditor, do not appear to have been certified, I doubt whether it is sustainable. Whenever an officer is specially required to certify, his certificate is essential to the validity of the document. But, in

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cases where he is not so required, his certificate may not be necessary.

Where the signature of the auditor of state is necessary, I doubt whether it can be affixed by a deputy. In the absence of the auditor, the chief clerk is expressly authorized to act, by the statute; but this provision is limited to the person who holds the office of chief clerk.

Judgment of not guilty.

THE UNITED STATES v. JAMES BROWN.

The act of Congress punishes counterfeiting the gold and silver coin of the United States.

And also foreign gold and silver coin made current by the laws of the United States.

The jury are the exclusive judges of the credibility of the witnesses.

To authorize a verdict of guilty, the evidence must be satisfactory.

Not that the evidence must show the guilt of the accused beyond all doubt, but it must produce a reasonable conviction of the guilt of the accused in the minds of the jury.

Mr. *Bartley*, District Attorney, for the United States.

Messrs. *Swayne* and *Spaulding* for defendant.

JUDGE MCLEAN'S CHARGE.

Gentlemen of the jury:—

THE great importance of this case, and the deep interest felt by the public in the trial, will induce me to state the case more in detail than has been my usual practice.

The first count in the indictment charges the defendant with having counterfeited fifty pieces of coin, each piece thereof in the resemblance and similitude of the gold coin, which has been coined at the mint of the United States, called a quarter eagle, unlawfully, feloniously did falsely make, forge and counterfeit.

In the second count, it is charged that he did cause and procure to be falsely made, forged and counterfeited, the said coin.

Third count, that he did willingly aid and assist in falsely making, forging and counterfeiting said coins, etc.

The last count charges the defendant with falsely making thirty pieces of half dollars, of the similitude of half dollars coined at the mint.

By act of Congress, the following silver coins are made current in the United States. "The Spanish pillar dollars, and the dollars of Mexico, Peru and Bolivia, of certain weight, etc. And gold coins are made current, to wit: the gold coins of Great Britain, Portugal and Brazil; the gold coins of France, of Spain, Mexico and Columbia," etc.

The act of Congress of the 3d of March, 1825, sec. 18, provides that

"If any person *shall falsely make*, forge or counterfeit, or *cause or procure* to be falsely made, forged or counterfeited, or *willingly aid* or assist in falsely making, forging or counterfeiting any, in the resemblance or similitude of the gold or silver coin which has been, or hereafter may be coined at the mint of the United States; or in the resemblance or similitude of any foreign gold or silver coin which by law is or hereafter may be made current in the United States; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States, from any foreign place, with intent to pass, utter, publish or sell *as true*, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, *with intent to defraud*," etc., shall be punished, etc.

Mr. Jans, a witness, states—After Brown's arrest, searched his house, and found in the garret, in a barrel, a number of cups made of copper and zinc. And also, between the garret floor and the lathing, the iron tools presented. Found in

a lower room a trunk, having within it bank note paper, containing articles of jewelry, scissors and cords, etc.

William Savage—Is a jeweller acquainted with gilding. Cups used for galvanic gilding, connected by wires; quarter eagles shown, given the appearance of gold by galvanizing. This art, for gilding, etc., was sold through many parts of the country some years ago.

The two quarter eagles presented, galvanized—the others, fire gilded. All counterfeited.

Mr. Wheeler—Is an engraver and copperplate maker. The iron instruments are part of the press of a copperplate printer, and might be used for a bank note press. Part of the paper found in the trunk, bank note paper. Specimens of notes, not on bank paper, at least some of them.

John H. Bellows—Has been acquainted with defendant ten or twelve years, by sight. Lives from ten to twelve miles from him.

In May, 1845, witness had a conversation with defendant, at his own house. A short time before this, witness had returned from Indiana. Defendant asked witness if he had seen Hoskison, and inquired what business he followed—said that he had been engaged in counterfeiting. Defendant inquired what kind of money they had there, and if he had seen any of their counterfeit gold? Witness answered in the negative—did not know there was any. Defendant replied that a good article of that kind could be got up. Also, that good articles of paper and silver could be got up, but specified no particular bank.

Before witness left defendant's house, a day was appointed at which they should meet at Akron, to exhibit counterfeit money—understood hard money. But no opportunity being afforded to examine the money when they met at Akron, defendant requested witness to call at his house. Witness called 5th July, but did not see defendant, he being not well or fit

for business. On 7th July, witness called again. Defendant showed him some of his money—\$20 on Yates County Bank, New York—which was counterfeit. Received five \$20 bills on this bank.

Defendant said that himself and others would be at work soon, and would get it up; and he requested witness to call again about the money, as soon as he could. Witness called again 28d July, when defendant informed him that he would have gold in about four weeks. That a man who could make it, they had sent for to Detroit, but he had not come. That they would send for him again—the man's family had been sick, which prevented his coming.

Defendant at this time showed witness notes on Yates County Bank. Witness got from him sixty dollars in \$20 bills. Before this, received from defendant five bills on some bank, each \$20; for all of which, he paid twenty cents on the dollar.

Defendant requested witness to come down in four weeks, and he would have the gold ready. Witness called at the time requested, but the man from Detroit had not yet come, his family still being sick, but defendant assured witness that he would be there in a few days.

Defendant complained that it was a hard country to get up a thing of the kind in, and did not know but that he should have to go to Pittsburgh for materials. He supposed they were watched—that there were many persons there who interfered with other people's business. And defendant proposed that witness should come in the night. The next visit was made in the night, and the witness was accompanied by Jacob Smith.

On this visit, defendant talked with the witness about the gold, but it was not yet ready; in a short time it would be. Defendant showed witness counterfeit dollars and fifty cent pieces. Received fifty dollars from defendant; fifteen dollars

in Mexican dollars, the balance in fifty cent pieces—not a very good article, but defendant said it would do him good. This was in August. Defendant said the man to make the gold was there; said if witness would come down such an evening, would have some gold; that they were at work night and day, and also defendant; that the place where the gold was made was at a blacksmith's, a friend of the defendant's, who lived in a private place. Witness remained three-fourths of an hour. After he left with Smith, he showed him one of the pieces of coin.

Next visit by witness, had with the defendant similar conversation with the above, but was disappointed in obtaining gold. He received from the defendant, at Hardy's grocery, as he now explains, some \$3 bills, four of them on Louisville. Defendant promised to send the gold to him on the next Saturday.

On 1st November, defendant sent by Wheeler two hundred and twenty-five dollars in gold, one hundred and twenty-five of which were in quarter eagles, or 20 shilling pieces, the balance in sovereigns.

Sold to defendant a horse for seventy or seventy-five dollars, and a yoke of cattle at sixty or sixty-five dollars. Wheeler took away the horse the same evening he handed to witness the gold. For the paper he was to pay twenty cents on the dollar, and for the gold thirty-three and one-third per cent. in the horse and oxen and in good money.

Afterward, witness saw Brown, who informed him that he liked the horse well; and he asked witness how he liked the gold. Witness replied that it was rather light. Defendant said it was the kind they had made and were making.

November 13th, witness received fifty dollars in quarter eagles, in the night, in part payment for the horse and cattle. At different times witness had loaned defendant from one to five dollars, which were never returned. This was the last

time witness got money from defendant. Witness saw a man called Stranahan at the grocery. Defendant said to him, "that is the man who made the money."

Witness says he let Martin have about one hundred dollars in gold. Booth got some twenty or thirty dollars of the silver. Witness returned some of the silver to Brown, and told him he had better work it over.

When witness was arrested, had gold pieces hid in the corn house at his father's—directed Martin to get it. Witness does not remember the exact sum, but it amounted to perhaps thirty dollars. Martin accompanied witness sometimes when he visited Brown. In fore part of July witness saw Holt at Tiffin, and also in April before. He was the same Holt to whom he gave counterfeit money. August 19th, witness received fifty dollars in silver from defendant.

Jacob Smith—Went to Brown's in company with Bellows, at his request. This was after dark. Witness did not go into the house, but remained in the road from a half to three-quarters of an hour. He saw Bellows and Brown out of the house, talking together. After they left Brown's, Bellows showed him, and perhaps handed him, a roll of coins, and took out one or two half dollars.

John W. Rickets—Saw Brown in 1840, when he observed to witness, "you ought to become better acquainted with me." And asked witness "if he understood him?"

Some time last fall defendant handed witness a genuine half eagle, and requested witness to get two quarter eagles for it, which he did. Afterward defendant wrote a note to Hiram Brown, requesting him and witness to send to him five dollars in gold. On Monday evening witness sent to him a quarter eagle, and Brown sent a sovereign.

Witness was arrested at the time the defendant was arrested. Defendant charged witness that he must never say anything about the two quarter eagles sent to the defendant. He told

witness that they were making quarter eagles down there, near his house; and he said these were a good article.

About 1st December, 1845, Brown requested witness to inquire what kind of a scrape Bellows had got into, in Stark county? Witness made the inquiry of Bellows, and stated to Brown that he had got into no scrape which he could not easily get out of. Brown said he was glad to hear it, as Bellows was a clever fellow, and that he was right.

Matthias Martin—Became acquainted with Brown in 1845, in the fall. Went after night, with Bellows, to defendant's house, two or three times in all. Witness remained out of doors to watch the horses, supposing defendant and Bellows did not wish his presence. The first visit, witness thinks they remained at Brown's about an hour. As Bellows was about leaving, saw Brown at the door of his house.

The second visit, Bellows remained longer than the first one. Saw Brown, when Bellows came out, at the door, as before. The night was not dark, and witness was in the door yard. Whether there were three visits or not, in which he accompanied Bellows to Brown's, witness can not be certain. But the last visit, heard Brown say, "Jack, you shall have that money on Saturday morning next, and I will either bring or send it to you." This was Wednesday.

Something about danger was said, when Bellows observed, "There is no danger." The next Saturday after, saw a man riding one horse away from old Mr. Bellows's, and leading another.

Same evening, Bellows opened and showed witness a roll of money—quarter eagles and some other gold pieces. This was done in five minutes after the horse was led off. Went the same evening, with Bellows, to Brimfield. Saw Booth at that place, to whom Bellows gave \$50. Returned home the same night. Witness got from Bellows \$50, in quarter eagles; and Booth showed witness the same sum which he received.

Thomas McKinstry—Some time before Brown was arrested, witness received a *counterfeit quarter eagle* from defendant. Witness had applied to defendant to discover where a bogus machine had been conveyed, and he promised to make the discovery, if aid could be given to his son Daniel in Michigan, who had been indicted for counterfeiting coin; and, also, that certain influences should be used with the marshal and district attorney of this State, to pardon the defendant.

DEFENDANT'S EVIDENCE.

Cook—Claims the trunk as his property, and its contents, including the iron instruments exhibited—that he is a “steel and copper plate printer,” and a printer of bank notes. Is associated at St. Louis with Witchell, under the firm of Witchell and Cook—that his partner is an engraver.

That in 1845, witness arrived at Cleveland from Buffalo, on his way to Pittsburgh. Took passage on the canal boat commanded by Captain Baxter. Being short of money, he made an arrangement with Daniel Brown, who came on board the boat, that the latter should advance to the witness \$25, for which witness should pay \$30, and would pledge the trunk now in court, with its contents, for the payment of the money. The trunk to be forwarded to the address of witness so soon as the money was paid.

The 24th September, 1845, the trunk was carried from the canal boat to Brown's, by the witness and Daniel Brown, witness leaving immediately, and overtaking the boat. Witness went to Pittsburgh, hired an office, remained there a few days, left, and has not since returned. Paid six months rent. Witness lived at Cincinnati—worked at his trade with a certain firm—printed notes for the Trust Company and other banks.

Came through Akron—received there a letter from Daniel Brown. Remained but a short time—came on—remained at

Amity six days. Passed through this city—went on to Jeffersonville, twelve or fourteen miles south of this place, where he saw Daniel Brown, with whom he remained only a short time, and then returned to this city.

M. C. Richardson—Keeps a public house at Cleveland—Cook stopped with him, took the canal boat, etc.

Hiram Adams—Saw Cook at Cleveland—recommended him to Capt. Baxter's boat.

R. D. Baxter—Commanded the canal boat *Hibernia* in the fall of 1845. Took Cook on board at Cleveland, and also Daniel Brown, near that place. Was called to witness a loan of money by Brown to Cook, \$25, for which the latter was to pay \$30, and pledged his trunk and its contents, which were seen by witness, for the payment of the loan—the trunk, etc., to be sent to Cook on the payment of the money. When opposite Brown's house, Cook and Daniel Brown took the trunk out of the boat, and carried it toward Brown's house. In some three or four miles, Cook overtook the boat.

Alex. Patton—Worked as a house carpenter two months last summer, beginning the fore part of July, for Daniel Brown, who lived in the same house with his father. Had free access to every part of the house. Laid a part of the garret floor. Saw in an old barrel, which he used for scaffolding, the materials presented, and which composed a part of a galvanic battery. Witness saw John H. Bellows at Brown's one evening. He was in company with some other person, who remained on his horse in the road. Bellows got down, went into the house. Witness knows Daniel Brown was at home, but is not certain whether the defendant was at home or not. Bellows returned to the road, after having remained some time in the house, and he and his companion rode off.

Benjamin Twissell—Some three years ago, a man came to Akron to sell receipts for constructing galvanizing batteries,

named Ady. Witness, in conjunction with Daniel Brown, bought one. Had the machine constructed, and left it at Brown's. Had another one built, which he sold for a horse which was kept by Daniel Brown, who agreed to pay witness \$25.

L. G. Steinhour—In the fall of 1845, witness being on his way to Brown's, to collect from him a note, about a quarter of a mile before he reached Brown's, he saw two persons, one was sitting in the shade, the other was riding his horse up and down the road, apparently to show his paces or gait. Bellows was on horseback, who asked the witness where he was going. Witness answered, to Brown's, to see if he could get payment on a note in dimes, etc. Bellows told witness Brown was not at home, on which witness returned. Wheeler was the person sitting in the shade. Bellows asked witness to get up behind him, to ride over the river; but witness declined, saying he had borrowed a canoe to cross, and must cross the river in it. After crossing, he fell in with Bellows on the tow path. Came to a waste wier, and witness rode over it, behind Bellows.

Witness observed to Bellows that he had a good horse. Yes, B. replied, but he is not mine; I have sold him to Wheeler for \$70 or \$75; and that he had also sold to Wheeler a yoke of oxen; that Wheeler lived with old Jim.

Witness heard Bellows swear against Brown before the commissioner, and afterward witness asked him what induced him to swear as he had done, in relation to the horse. Bellows replied that every one had his own notions in regard to swearing. Afterward Bellows saw witness, and requested him to say nothing about what he had said to him. Thinks he saw Bellows at Brown's, the latter part of October, 1845.

C. B. M'Donald—Has known John H. Bellows five years. Said that he supposed the people might think him a scoundrel, for coming out and disclosing, as he had done to Mr. Otis, against Brown. That he was under the necessity

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of doing so for his own safety. That he would never be a witness against James Brown. Saw the yoke of cattle in Wheeler's possession, who offered to sell them. This might have been in August last.

John Boosinger—Told his son and John Bellows, who were in jail, that Mills wanted them to turn State's evidence against Brown; both said they knew nothing against Brown. Mills said they wanted to get hold of the leaders of the gang.

J. D. Wild—Lives at lock, one and a half miles below Brown's, since the 22d July, 1845. Saw John H. Bellows at the lock on January 7th, the Wednesday before the defendant was arrested—inquired for Wheeler—went toward Akron. James Brown was at the lock on the 4th of July, 1845; remained all night, and also on the 5th, until one or two o'clock.

Next Monday, 7th of July, defendant came to the grocery at the lock—was on horseback—rode toward Cleveland. On the 4th or 5th, Brown was drinking, but can not say that he was drunk.

Moses O'Brien—After Brown had his trial, talking in the street with some persons, Bellows came up to them, touched him on the shoulder, and stepping aside, observed to witness that he had got into a scrape. Bellows said it was proposed that he should go clear, if he would come out and prosecute Brown.

Bellows wanted witness to take money, and say that Brown had given it to him. Witness replied that he would have nothing to do with it. Witness only knew Bellows from sight. Witness got a letter out of a certain post office for Wheeler, and received from him one dollar.

B. C. Mosher—Lives in Providence, Lucas county. In the latter part of July, or forepart of August, saw Bellows at Tiffin. Was about buying a horse of witness; agreed to give \$75. Went into a room, and Bellows offered him gold, quarter eagles, which witness refused to take, supposing it

not good. Bellows had, in appearance, one hundred quarter eagles.

Witness described Bellows as wearing a cap, and a coat of certain cut and material.

John Hobbie—Was at Brown's on the 7th July, 1845—made inquiry, and was informed that Brown was not at home.

Wheeler has lived at Brown's since March, 1845.

Yoke of cattle taken to defendant's in August last.

Thinks the horse was taken to Brown's the forepart of October.

Alexander Burton—Heard the greater part of the evidence of Bellows before the commissioner, against Brown.

Understood from Bellows, that he called on Brown to know if he had counterfeit money; Brown said an article of the kind could be got up. Stated that he got money the 5th of July. Said nothing as to his meeting Brown in Akron, as now stated by him, to talk with him about counterfeit money.

Can not say when Bellows stated before the commissioner at what time his first interview took place with Brown.

Gen. Burre—Acted as counsel for Brown before the commissioner. Took minutes of Bellows's evidence. Bellows said that he went to Brown's to get counterfeit money. This was the first time he conversed with Brown. Brown said such an article could be got up, and Bellows then asked him to get it up. This was the latter part of May.

Said he called on the 5th of July; saw Brown and his wife, and got \$100. This was between 12 and 2 o'clock on the 5th; said nothing of being at Brown's on the 7th of July. He said he got the gold the latter part of October—contract for oxen was made in July; called latter part of July or 1st of August. Next visit latter part of August or 1st of September; next, latter part of September, or beginning of October.

Bellows stated that he received on the 4th, three dollar

bills, at Hardy's grocery, from Brown ; several persons were present. Brown asked him to step aside, and presented to him these bills—said they were something new, and might do him some good. The cattle, he said, were sold for \$60; the horse for \$75.

Stated that the gold was sent to him by Wheeler, the latter part of October. That about the 1st of September got the half dollars. Said nothing about Martin. Did not state that any one was with him at Brown's, except Smith. About six weeks before examination before commissioner, got in gold from Brown \$45.

After Bellows was confined, witness called on him as counsel—stated his case. Afterward Bellows was asked what he knew about Brown, when he replied that he never saw Brown have any counterfeit money, that he had talked with him about it.

Bellows said, several were drinking at a grocery, when some one threw down a half dollar; it was remarked that was bogus money. Brown said, if that is bogus money, I have plenty more just like it. That is all, Bellows said, that I have ever heard Brown say about counterfeit money.

Rickets was sworn on Hiram Brown's trial, but he said nothing about Brown's having counterfeit silver. He said that he knew nothing against Brown.

Zebulon Jones—Heard Bellows swear before the commissioner; said he was positive he received money the 5th July; said nothing about Brown's being intoxicated the 4th July—did not name the 7th. Bellows said that Brown said such an article could be got up, and witness advised him to get it up. Nothing said of getting New York bills 23rd July—omitted other things.

REBUTTING EVIDENCE, UNITED STATES.

Horace Kay—Has been acquainted with Steinhour eight years. His character for truth is not good. Witness would believe him under oath as he believes other witnesses.

Hiram Fuller—Some say Steinhour's character is not good; can not say how the majority speak on that subject.

Major Cole—Keeps Union Hall in this city—Cook, the witness, stopped with him. Brought to his house the trunk exhibited in court—took it away some days since.

IN SUPPORT OF UNITED STATES' WITNESSES.

Warren H. Smith—Has known Rickets eight or nine years. His general character is good for truth. Witness would believe him under oath. Knows Bellows; his character for truth is good. Witness would believe him under oath, where there were corroborating circumstances.

Mr. Spicer—Has been acquainted with Bellows since he was a boy—his character for truth is good, and witness would believe him under oath.

Israel Allen—Has known Bellows twelve or fifteen years. Knows no reason why witness should not believe him under oath. Nothing known against Bellows except his connection with the defendant.

Witness thinks he varied some in his statement here, from his evidence before the commissioner.

Alexander Brewster—Has known Bellows since a child—his character for truth is good. Nothing against him except his connection with the defendant. Before this occurrence, would have believed him—and now, can not say that he could disbelieve him under oath.

Some variance, owing, as witness supposes, to different questions.

Mrs. Jane Sheff.—Bellows stated before the commissioner,

that Brown, in their first interview, asked him if he had seen any coins—thinks he referred to witness' trip to Indiana. Brown said an article could be got up—that the conversation commenced about farming. Bellows said, repeatedly, he could not recollect all his visits to Brown, or the dates. There was a variation from the 5th to the 7th July, between his statement on this trial, and before the commissioner.

McDaniel's general character for truth is bad. Witness would not believe him under oath.

Bellows said before the commissioner, that he received the Louisville notes at Hardy's grocery.

John H. Bellows—After 7th July went to Tiffin—wore a grey striped frock coat and hat. Was there only once in July. Had with him no counterfeit gold coin.

He kept an account on a board of the moneys received from Brown. By a reference to those dates he is able to speak more specifically now than before the commissioner. His statements before him were made when he could not refer to his account. Does not recollect of having stated in his examination here that the Louisville notes were received at Brown's; if he did say so he was mistaken, as they were received at the grocery.

Ithamer Bellows—His son was absent four or five days in July—forepart of the month. Wore a striped frock coat and hat, when he went away and when he returned. Was absent only this time in the month of July.

Joseph C. Jones—About five years ago became acquainted with Cook. His general character for truth not good. He never printed any notes for the Trust Company.

REBUTTING BY DEFENDANT.

Samuel Edgerly—Does not know any thing in the neighborhood prejudicial to the truth of Steinhour.

O'Brien's character is good.

General Burr—Would believe O'Brien under oath.

Tebulon Jones—Knows nothing against Steinhour.

A. Miller—Steinhour, where morals are concerned, is a small pattern.

McDaniel's character the same.

Mr. Lee—Would believe Steinhour under oath.

Patrick Christy—Steinhour does not always adhere to the truth.

The circumstances of this case are somewhat peculiar. The jury can not but perceive that the defendant, from the qualities of his mind, and the energy of his character, as disclosed in the evidence, exercises an uncommon influence over those with whom he associates. Indeed, he is not undistinguished in the county of his residence. He at this time holds the commission of justice of the peace, elected by his fellow citizens, and it appears he has much influence in the neighborhood.

The strongest witness against the defendant is Bellows. This witness is impeached by his own admissions, that, for some time, he was an accomplice with the defendant. The counsel in the defense have assailed this witness on four grounds.

1. That he is an accomplice.
2. That a motive of revenge, or a corrupt influence, induced him to give evidence in behalf of the prosecution.
3. That there are contradictions in his statements.
4. That he is contradicted by other witnesses.

The contradictions consist mainly in declaring, as you have observed in the testimony, that he sold the oxen and horse to Wheeler, and that he knew nothing against Brown. Steinhour swears that such was Bellows's declaration the day he met him near Brown's.

The character of Steinhour is assailed by proof that his reputation for truth among his neighbors, is not good, while other witnesses think him worthy of credit. In judging of

the credibility of a witness, the jury will always consider the circumstances under which he testifies, and under which his statements at different times were made. This remark will apply to the witness Bellows. Some of the contradictions charged against him are explained, and others are accounted for by the peculiar circumstances under which he was placed.

It appears from the testimony of Mr. Otis, a highly respectable member of the bar, at Akron, and Mr. Mills, a deputy marshal, that Bellows was much influenced by their advice in disclosing the facts. Accomplices are often used for this purpose, and not unfrequently, great good is done to the public through the evidence of accomplices.

As a general rule, it is said that a jury will not convict on the testimony of an accomplice, uncorroborated by other evidence. In this case, it is contended that much of the evidence of Bellows is corroborated. As for instance, the sale of the oxen. It was proved by E. R. Bellows, and others, that he was seen on Brown's farm several times. The sale of the horse, which he swears to, is also proved by others; and that he was seen in possession of the gold. Hiram Ayres, Jacob Smith and Matthias Martin, establish many of the facts stated by Bellows, which go to the most important statements made by him.

Several of the witnesses, who have long known Bellows, notwithstanding his connection with the defendant, would believe him under oath, and who say his character for truth is good. You, gentlemen, are exclusively to judge of the credit due to the witnesses. You are to weigh the evidence, and in the exercise of your own judgment, will come to the decision as to the guilt or innocence of the defendant. Your minds must be clear as to his guilt, before you convict him. Not that clearness which excludes all doubt, but a rational conviction of guilt, which is satisfactory to your consciences. The jury found the defendant guilty, and he was sentenced to hard labor in the penitentiary for — years.

J. DOE, EX DEM. SAMUEL M. REYNOLDS v. N. CORDERY.

An individual acting under an informal power, sells lands in his own name, having no claim to the same, his contract will not enable the purchaser to claim compensation for his improvements under the occupying claimant law.

He cannot be said to claim the title, or hold the same, "from and under any person who can show a plain and connected title in law or equity," etc.

Mr. *Stanbery* for plaintiff.

Mr. *Goddard* for defendant.

OPINION OF THE COURT.

A VERDICT was found for the lessor of the plaintiff; and judgment being entered upon it, an application was made in behalf of the defendant, for the benefit of the occupying claimant law.

The title under which the defendant entered, originated as follows: A letter of John Reynolds, dated 12th of May, 1843, to James Patrick, Esq., of New Philadelphia, Ohio, introducing his son, Lieut. William Reynolds, of the navy, "who visits Ohio for the purpose of viewing the land of his mother, Lydia Morse Reynolds; and, should he think proper to enter into any engagements for the sale of said lands, or any part of them, such engagements will be satisfied and carried into effect by his mother and myself."

The said William Reynolds entered into a contract for the sale of two tracts of land, of one hundred acres each; and he agreed with Nathan Cordery that he would cause a deed to be made. One hundred dollars of the consideration money were paid; the deed was to be executed shortly after the payment. No further payments were made, nor was the deed executed. But Reynolds and wife conveyed the land to another son, and he to the lessor of the plaintiff, who brought the ejectment.

Sarah W. Story et al. v. H. W. Derby et al.

The occupying claimant law provides, Ohio Laws, 605, 1 sec., that where the tenant can show a plain and connected title, in law or equity, derived from the records of some public office, or being in quiet possession of and holding the same, by deed, devise, descent, contract, bond or agreement, from and under any person claiming title as aforesaid, derived from the records of some public office, etc., under rules on execution, taxes, etc., he shall not be evicted until he shall be fully paid the value of all lasting and valuable improvements made on said land, etc.

The vendor, William Reynolds, did not sell as agent, as appears from the face of the contract, but in his own right. It appears, therefore, that the title of the defendant does not come within the provisions of the statute. The motion, therefore, to institute a proceeding under the statute, is overruled.

SARAH W. STORY ET AL V. H. W. DERBY ET AL.

Before granting an injunction on a charge of an infringement of copyright, the court will, generally, refer the matter to a master, with instructions to report the extent of the infringement, if any, that the court may act on the case.

Mr. Walker for complainant.

Messrs. *Gholson* and *Holcomb* for defendant.

OPINION OF THE COURT.

THIS is an application for a preliminary injunction, which, having been argued, the court adopted the following order:

This day came the parties, by their solicitors, and the motion on behalf of the complainants for a preliminary injunction to restrain the publication of the book of the respondent, named in the bill, and answers, and affidavits; and having

heard the arguments of counsel, and deliberated on the same, do order that the injunction prayed for be not granted. And it is further ordered, that the case stand referred to master commissioner Mansfield, for examination and report—that is to say:

1. Whether the book of Mr. Holcombe contains any portion, and if so, what portion, of the commentaries of the late Justice Story, described in the bill, showing fully the similarities or coincidences of the book of the respondents, with the commentaries, as well in arrangement and plan as in matter; and whether, in the points of coincidence between the two books, in the matter, plan, or arrangement, in which the similarity, if any, is found, was original in the commentaries of Judge Story.

2. Whether the book of the defendants is a fair and *bona fide* abridgment of the commentaries of the complainant, or a colorable one, calculated to supersede the use of the commentaries to any considerable extent.

3. Upon such other matters, relating to the matters in controversy, as either party may request him to examine and report upon. And in making said report, the said master may use the original papers on file, or such as either party may place on file, and may, in aid of his examination, summon such persons as he may deem expedient, and report the testimony so taken, if any, to the next term of this court. The said master may proceed to said examination at any time agreed upon by the parties; or, in case no such agreement is entered into, then at such time as the said master may fix, giving the amount of the parties at least ten days' notice of such time. Either party may proceed to take testimony for the final hearing of the cause, as they might do if this order of reference had never been made. And for the coming in of the report, and further proceedings in the premises, this cause stands continued.

SUYDAM, SAGE & CO. v. WATTS.

A fabricated warehouse receipt, representing that a large amount of pork had been received by defendant, subject to the orders of the plaintiff, irrevocably; which receipt, accompanied by a draft of \$12,000, being forwarded, was accepted and paid by the plaintiffs, affords a ground for an action against the warehouse man, to the extent of the injury received.

By making the advance, the plaintiffs, who were commission merchants in New York, expected to sell the property and receive the ordinary commissions.

This was in the line of their business, and the only motive they could have had to advance the money.

The loss of this constitutes an item of damage which the plaintiff may claim.

It was a part of the contract.

The defendant is also liable, on the fraud, for the money advanced.

Messrs. *Ewing* and *Forman* for plaintiffs.

Mr. *Hunter* for the defendant.

OPINION OF THE COURT.

THIS is an action of deceit. The case made in the three first counts in the declaration is, in effect, this: The defendant executed a receipt, saying that Samuel Adams, on the 24th of November, 1843, delivered to him two thousand barrels of mess pork, marked A, in good order, etc., for, and irrevocably subject to the order of the plaintiffs, and agreeing to deliver the same with all reasonable diligence, so soon as the navigation would permit, to the plaintiffs, in New York, in like good order, dangers of fire excepted, they paying charges, etc., and further specifying that the plaintiffs should hold said pork for sale on commission, and have a lien thereon, not only for the subjoined draft against his (the said Adams's) property, of twelve thousand dollars, but also a general lien thereon for all other liabilities incurred or to be incurred for the consignors.

Adams drew his draft for the above sum, subjoined to the receipt, indorsed the same to the Leather Manufacturers' Bank, and forwarded the draft and receipt to plaintiffs, who accepted the draft and paid the same at maturity to a *bona*

vide holder. But the statement was false; no produce, whatever, had been delivered by Adams to Watts, and plaintiffs have lost their reasonable commissions, and are in danger of losing the amount of their advance.

To these counts there is a general demurrer.

In the declaration three grounds are assumed, on which damages are claimed:

1. In being defrauded of divers commissions and gains which would have accrued to them on the sale of the said property.

2. In being in danger of losing the moneys paid on the draft.

3. In being otherwise greatly injured and damnified.

The third ground, it is argued, in support of the demurrer, is too general. That if it stood alone, the declaration would be bad for uncertainty. That its only use is, to show the violence, etc., of the defendant's conduct, and give character to the case. 1 Chitt. Pl. 398.

The cause of action, it is contended, set forth, is not such as necessarily shows that the plaintiffs have sustained damage. It might be all true that the defendant gave a false receipt, and that the plaintiffs were thereby induced to accept the bill, etc., and yet the plaintiffs not be injured. Adams, the drawer of the bill, might have refunded the amount of it to the plaintiffs. Hence the necessity, in pleading, to negative such payment by Adams, and aver the special damage. The rule is, "that when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration, that the resulting damage should be shown with particularity."

1 Chitt. Pl. 396. That another rule is, "that the particular damage, in respect of which the plaintiff proceeds, must be the legal and natural consequence of the injury done." And "special damage must be stated with particularity, in order that the defendant may be enabled to meet the charge, if it

be false." Ibid. And the counsel insist that the special damages claimed in this case, are not the "legal and natural consequence of the act complained of."

And first it is said the alleged loss of commissions and gains which it is claimed "would have otherwise accrued." The acceptance of the draft, it is said, "had no connection whatever with the commissions."

In answer to this, it may be asked, for what purpose does a commission merchant make advances? That is a part of his regular business. It is true, he may charge a commission on his advances, but his business is not to loan money, but to sell property on commission. And as a means to enable him to secure consignments, he makes advances. Was not that the object of the plaintiffs in accepting the draft in this case? It was not that the money would be paid to them with interest and a per cent. for the advance, but that the property should be consigned to them for sale. This was promised by the receipt, and it was in the line of the plaintiffs' business to make such an advance. Then it was the natural and legal consequence of the payment of the advance, that the plaintiffs should have the usual commissions for the sale of the property consigned.

With the view to this action, the transaction must be considered as real, and the legal consequences resulting from it. It having been fraudulent and fictitious, is the ground of complaint, and shows the damage by showing what would have been the benefit, had the transaction been *bona fide*.

The defendant's counsel would limit the payment of the draft, under the second ground, to the danger of losing the money advanced. If the money had not been advanced, the plaintiffs could not have been in danger of losing it; but the inducement to make the advance, is the question here. Not that the plaintiffs are in danger of losing it, because they made it. The only inducement to the advance was, to secure the consignment of the property, as above stated.

The counsel seems to think that the law, in a case like the present, can give no compensation. That that is done for services rendered; and not because, by the conduct of the defendant, the plaintiffs "have lost the opportunity to make commissions." Why not give compensation in such a case? Is it not a contract? Have not the plaintiffs advanced twelve thousand dollars to secure the sale of the pork; and if the sale be not given to them, may they not claim compensation for a breach of the contract? This does in no respect differ from ordinary contracts made daily, for a breach of which the law gives damages.

But it is said, if there was a contract, why not bring the action upon it. There was the form of the contract, but the fraud of the defendant withheld from it the substance of a contract. He has made himself responsible on the ground of fraud, and for that he should be prosecuted.

The false warehouse receipt which he gave, saying in it that the property was to be irrevocably held subject to the plaintiffs' order, created a responsibility on the part of the defendant, if the statement had been true, to keep the property safely, and forward it as soon as practicable to the plaintiffs, which he promised to do. The whole being false, he is not the less liable to the plaintiffs for the deceit. And it is not for him, or those who represent him, to say, sue on the contract and not on the fraud. He is liable as the plaintiffs seek to make him liable, and that is a sufficient answer to the demurrer.

As to the second ground, that the plaintiffs are in danger of losing the money paid on the draft, it is said, the allegation does not allege a loss, and consequently they having suffered no damage, can recover none. And it is objected that there is no averment in the declaration, of the inability of Adams to refund the money paid on the draft. Can this be relied on by the defendant, as a sufficient answer to his liability? That Adams, having received the money, is liable, is admitted, but

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is not the defendant also liable? If he be liable, the plaintiffs are not bound to sue Adams before they can resort to their suit against him.

The advance was made on the faith of the defendant's receipt, as a warehouse man. The plaintiffs looked to the pork, as a security for the money, and by the advance made, it was their own until they were completely reimbursed. Though Adams may be, or may have been, a man of property, the twelve thousand dollars were not paid on his credit. The transaction was commercial in its character, and the defendant as warehouse man, occupied a position of peculiar trust and confidence; and he is bound to answer in that capacity. He was the chief instrument in the fraud, which could not have been successfully carried out, had it not been for his co-operation. He is, therefore, in morals as well as in law, responsible to the plaintiffs for the injuries experienced by them, through his fraud. The demurrer to the first three counts is overruled.

DUNBAR, BROOKE AND DUNNING v. SAMUEL H. BROWN.

Where a debt guaranteed is not paid, notice to the guarantor must be given in a reasonable time.

The same strictness is not required in such a case, as to charge the indorser on a bill or promissory note.

Nothing can excuse the want of notice, but the insolvency of the debtor.

Messrs. *Erving* and *Erving* for plaintiff.

Mr. *Stanbery* for defendant.

OPINION OF THE COURT.

THIS action is brought against the defendant as guarantor. Samuel Cochran, a witness, states that E. C. Brown, brother of the defendant, purchased goods of the plaintiffs in Philadelphia, amounting to the sum of seventeen hundred and

thirty dollars and seventy-six cents; for which he gave his note, payable in six months. That the goods were purchased solely on the credit of the defendant, who guaranteed the payment of them. The understanding between the plaintiffs and the guarantor was, that the payment might be made in twelve or eighteen months; the witnesses, as to the time, do not agree. No demand was made of E. C. Brown until three months after the expiration of the year, at which time he proposed to give property in security for payment. In the ensuing May, 1842, the defendant admitted that a notice had been given to them that the note was not paid, and that they looked to the guarantor for payment. At what time this notice was served does not appear. Shortly after April, 1842, or about the time, E. C. Brown became insolvent.

The court instructed the jury, that in a reasonable time after the note became payable, it was the duty of the plaintiffs to demand the payment of the same from E. C. Brown, and give notice to the defendant that it was not paid. That the same strictness in making demand of payment and giving notice to the guarantor was not required, as was necessary to charge an indorser on a bill or promissory note. But that nothing could excuse the want of demand and notice, but the insolvency of E. C. Brown. If the jury shall find that the guarantor was to pay the bill for the goods in twelve months, still it would seem that the demand of payment should have been made of E. C. Brown when the note became due, and a notice of non-payment given to the defendant. If the guaranty was, that the payment by E. C. Brown should be made in eighteen months, contrary to the face of the note, and the payment at that time was guaranteed by the defendant, at the expiration of that time, a notice was indispensable.

The jury found for the defendant.

Hood, Assignee of Ritchey v. Eli A. Spencer et al.

HOOD, ASSIGNEE OF RITCHEY v. ELI A. SPENCER ET AL.

A partner having sold his interest in the concern to his co-partner, who gave a bond and security to relieve his late partner from the debts of the firm and to pay them out of his own property, is not an obligation merely to indemnify, but to pay the debts.

An obligation to indemnify, affords no ground for an action, until the party shall be damaged.

If the outgoing partner be discharged under the bankrupt law, he may still enforce the obligation to pay the partnership debts.

The creditors, for whose benefit the obligation was entered into may also enforce the obligation.

A replication is defective, to a plea of discharge in bankruptcy, which does not state the debt sued for, to have been placed on the schedule.

Messrs. *Hunter and Ewing* for plaintiffs.

Mr. *Stanbery* for defendant.

OPINION OF THE COURT.

In the declaration, it is stated that George C. Ritchey and Eli A. Spencer, being partners in merchandise, and owning stock in trade, and being indebted as such partners, on the 29th of May, 1840, dissolved their partnership upon the terms that Eli A. Spencer should have the partnership effects, and indemnify Ritchey against the debts of the firm, contracted prior to August 27th, 1839, and pay them as they shall become due. Thereupon the said Eli A. Spencer, together with Jesse Spencer and William Spencer, the defendant in this suit, on the said 29th of May, 1840, made and delivered to Ritchey their joint bond reciting the purchase of Ritchey's interest in the store, by which they agree to relieve Ritchey from all debts against the firm, which had been contracted prior to the 27th of August, 1839, then due, or to become due, and to assume the payment of the whole of them; and pay them out of their own funds as they should become due.

The declaration further states, "That Ritchey has been declared a bankrupt, and has obtained his final certificate,

and the plaintiff Hood is his assignee. That the said E. A. Spencer and Jesse Spencer have also been discharged under the bankrupt law, and have obtained their final certificate. That prior to the 27th August, 1839, the said firm had contracted divers debts as partners, which remained unpaid at the date of said bond. A list of the creditors is then set out, nearly all of whom have obtained judgments against Spencer and Ritchey, after the 29th of May, 1840; and all such debts are alleged to be due and unpaid to the several creditors."

The declaration then alleges, that by reason of said bond, the defendants became liable, before the discharge in bankruptcy of said Eli A. and Jesse Spencer, to pay said several creditors the amount due to each, respectively; but neither of said defendants has paid said debts to said creditors or to said Ritchey, before his bankruptcy, or to plaintiff as assignee in ce, etc.

The defendant, William Spencer, demurred to the declaration. Eli A. Spencer pleaded his discharge under the bankrupt act; to which plea the plaintiff replied specially, to which the defendant demurred. The defense rests on the demurrer to the declaration.

In support of that demurrer, it is said, it must turn upon the construction given to the bond. If it is merely a bond for indemnity, then no action accrued to Ritchey; for it is not pretended he ever suffered any damage from the non-payment of the debts.

The rule on this subject, it is said, is stated in *ex parte Negus*, 7 Wend. 504, in the following words: "Where indemnity alone is expressed, it has always been held, that damage must be sustained, before a recovery can be had; but where there is a positive agreement to do the act, which is to prevent damage to the plaintiff, then an action lies, if the defendant neglects or refuses to do such act; and where the covenant is both to do the act and to indemnify, we must resort to the intention of the parties."

And the counsel insists, that judging of the intention of the parties from what is recited in the bond, that indemnity was the sole aim and purpose of the bond. It was not, he says, in the expectation of the parties, that the mere liability of Ritchey to pay the partnership debts, should give him a cause of action against Spencer, or upon this bond; and nothing appears in the case to show that Ritchey has ever been injuriously affected by these debts; but only that up to a certain time, his liability continued. It is true the covenant is, that the debts shall be paid when they become due; and that covenant has not been performed. If it stood alone, there could be no question, but it is coupled with an express covenant of indemnity. This covenant gives character to the whole, especially when we consider the circumstances under which it was made."

But, it is argued, if a right of action did arise to Ritchey in the non payment of the debts, that such right was extinguished *ipso facto* by Ritchey's discharge in bankruptcy. The debts to be paid were not due to Ritchey, but to third persons, who could not take advantage of the covenant, and who, in fact, wholly disregard this private arrangement, by suing both their debtors instead of the one who had agreed solely to pay their debts. Not a dollar of the money could come into Ritchey's hands, and the only effect of a payment of the debts would be to discharge him from liability.

The above comprises the principal grounds of the very earnest and somewhat elaborate argument, in support of the demurrer. They have been stated somewhat at length, that they may be applied with all their force to the case before us.

We suppose that the court, in the case cited from Werdall, by saying where a covenant of indemnity is coupled with a covenant to do an act, the court must judge of the intention of the parties, could have had no reference to a case like the present. There may be cases supposed, where the language of the court would be applicable. As a covenant to indem-

nify from a contingent liability, and to do an act in which the other party had no immediate and direct interest in its being done. But what is the case under consideration? A partnership is about to be dissolved; it owes debts; the goods are liable to pay those debts, to the exclusion of all other creditors; one of the partners takes them, and he with his two obligors "bind themselves, their heirs and assigns, to relieve the said George O. Ritchey from any and all claims, debts, dues, and demands against the said firm of Spencer & Ritchey, etc., that are now due, or that may become due hereafter; and that we will assume the payment of the whole of them, and pay them out of our own funds, as they may become due." Now there is but one way in which the obligors could "relieve" Ritchey from the debts of the firm; and that was by paying them. And if there is no other manner by which they could "relieve" him, does this not end the controversy?

The counsel uses the word "indemnity." That word, instead of the word "relieve," used in the bond, may be found in the declaration. And on this the basis of the argument rests. If that word, "indemnity," were as potent in this case, as the counsel supposes it to be, how readily could the declaration be amended, and the word "relieve" substituted for "indemnity."

But if the word "indemnity" had been used in the bond, the construction of the instrument would be the same. It must be observed that the intention in requiring the bond was to secure the creditors of the firm, who were not parties to the agreement, and, consequently, were not bound by it. Ritchey, as an honest man, beyond any personal liability to the creditors of the firm, must have felt a desire to pay those men, who in selling their property to himself and partner, had confided in their integrity and ability to pay. And the law, which never presumes fraud, would fix an honest motive, to a fair transaction. Indeed, the instrument is not susceptible of any other construction.

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It is supposed that Ritchey could not have sustained an action on this instrument until he was damnified. If E. A. Spencer had misapplied or wasted the goods, could he not have filed a bill, and called on him to execute the trust? And especially could he not have done this, if his late partner and one of his sureties were about to become insolvent. Could not the creditors have interposed under like circumstances? An action may be maintained by a creditor where an individual has agreed to pay him, in discharge of a debt which he owed to another person, at the instance of such person.

In every case where there is an agreement to indemnify an individual, and pay certain debts which he owes, no court, having any regard to good morals or law, could hold that an indemnity was all that the debtor could ask; or that it was all that the other party bound themselves to do. The construction would be that they were to indemnify the debtor by paying the debts, that mode being provided for in the contract. The whole of the contract must be taken together and construed. The undertaking was not to indemnify *or* pay the debts; it was to do both. Courts can not divide contracts, and hold that a performance in part shall be substituted for a performance in whole. And especially this will not be done where every moral consideration and fair dealings among men require the full performance of the contract. The demurrer to the declaration is overruled.

The replication of the plaintiffs to the special plea of discharge under the bankrupt act, by E. A. Spencer is defective, as it is not averred in the replication, that the claims of the firm of Spencer & Ritchey, referred to in the declaration, and covenanted to be paid by the defendants, were not named in the schedule of the said Spencer in bankruptcy. The demurrer, therefore, to the replication is sustained.

Wherefore, it is considered, that said Spencer, by reason of his discharge in bankruptcy, go hence, etc.

Leave given to William Spencer to plead.

PINNES & TUTTLE v. DAVID J. ELY.

Two notes having been given, signed by Ely and Hawes, payable to Walden, Thomas & Co., the notes were indorsed by them, and also by David J. Ely, in blank. Afterward, David J. Ely agreed with Walden, Thomas & Co. on the delivery of the above notes, to pay the amount, as if he had indorsed the notes. Held, that he was liable, the surrender of the notes to him being a valuable consideration.

Mr. Rankin for plaintiffs.

Mr. Hunter for defendant.

OPINION OF THE COURT.

THIS is an action of assumpsit, brought against Ely, as indorser of two notes, one dated 10th of February, 1841, for \$2,500, payable in twenty four months, at the Bank of Port Gibson, and signed Ely & Hawes. The note of the same date, for \$2,800, payable in thirty-six months, at the same bank, signed Ely & Hawes. Both notes were given, payable to the order of Walden, Thomas & Co. The notes were indorsed by them, and also by David J. Ely, in blank.

On the 3d of August, 1841, the following agreement was made by the defendant, with Walden, Thomas & Co. After referring to the notes above stated: "Now, in consideration of the above described notes, I have received from the said Walden, Thomas & Co., the following notes of Foster & Ely and David J. Ely, amounting to the sum of the above two notes. And the condition of the delivery of Foster & Ely's and my own individual notes to me, is this, that until the said notes of Ely & Hawes are fully paid, to the holders thereof, I am held and firmly bound to the said Walden, Thomas & Co., and hereby bind myself, my heirs and executors, for the payment of the said two notes of Ely and Hawes, in the same manner and to the same extent in all respects as though the said two promissory notes had been drawn and made

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payable to my order, and by me indorsed to the said Walden, Thomas & Co."

The court instructed the jury that the above was a binding contract on David J. Ely, the same as if he had indorsed the two notes above stated, it having been entered into for a valuable consideration. The jury found for the plaintiffs and assessed the damages at \$6735.

BUCK ET AL V. GILL ET AL.

The claim of Buck, in his cooking stove, as his own invention is, "the fines described in combination with the extended oven."

And as the defendants appeared to have infringed the right of Buck, thus stated, a preliminary injunction was granted.

Mr. Fox for complainants.

Messrs. Ewing and Swayne for defendants.

OPINION OF THE COURT.

THIS bill is filed by the complainants, representing that they are interested in the making and selling of Buck's cooking stove, for which Darius Buck obtained a patent from the United States, on the 20th of May, 1839. That he was the original inventor of the improvement specified in his patent; and that the defendants have long been in the practice of making and vending cooking stoves, substantially on the same plan and principle as Buck's stove, which operates to their injury, in preventing the sale of their stove, and the complainants pray that an injunction may be allowed to prevent the further infringement of their right, by the defendants, and that other and further relief may be given, etc.

The defendants in their answer deny the infringement, and call upon the plaintiffs to prove their right under the patent, the validity of which is questioned, etc.

In his schedule, which constitutes a part of his patent, Buck says, "whereas, difficulties occur in the cook stoves now in use in carrying on at the same time baking and boiling, and also in having an oven of such uniform temperature that every part will cook or bake uniform, and also in having an oven of sufficient size as to do away with the occasional use of the brick oven, in large families, without any increase of fuel, and also in having an oven around which there is a certain free and uniform draft. And whereas, my invention has respect to the aforesaid difficulties, now, therefore, be it known, that I, etc., have invented certain improvements in the construction of stoves used for cooking, and I do hereby declare that the following is a full and exact description thereof, reference being had to the drawings which accompany this specification, and are a part of the same," etc. In describing the structure of the stove, among other things he says, "No. 2, the oven is thus made to extend from the back part of the stove to the front part of the stove, under the open hearth, so that the back plate of the stove is a flue plate under the open hearth of the stove. The plates that form the outside of the flue around the oven under the hearth, are so constructed that any horizontal division of the flues and oven under the hearth is similar to the hearth; or the last mentioned outside flue plate may be made straight or flaring, but they are better to curve according to the shape of the hearth-plate, for, by preserving this form, the flue will be enlarged, and the heat of the hearth, the top of the oven, the temperature of the oven and the draft, all will be increased."

In summing up, he says, "I do not claim as my invention the placing of the oven in cooking stoves, under the fire place of the stove, as that has been long known and in use, nor do I claim the invention of reverberating flues for conducting the heat, etc., under the oven, as they also have been for a long time known. What I do claim as my invention, and for which I desire to secure letters patent, is, the extension of

the oven under the apron or open hearth of the stove, and the combination thereof with the flues, constructed as above specified, by which means I am enabled to obtain greater room for baking and other cooking purposes, and effect a greater saving of expense and fuel than in cooking stoves of the ordinary construction."

Now, what does Buck claim as his invention? He says he "does not claim as his invention the placing of the oven in cooking stoves under the fire place of the stove, as that has been long known and in use." But he says, "what I do claim as my invention, is, the extension of the oven under the open hearth of the stove, and the combination thereof with the flues, constructed as above specified." In fewer words, "he claims the flues described, in combination with the extended oven."

Was this improvement known before? Hathaway's stove was in use before Buck claims to have invented his improvement. But there is this difference between them: The Buck stove has the oven extended, and the front flue or air chamber connected therewith, which gives a uniform heat in the front of the stove, as well as in the rear of it. Hathaway's stove has not this connection. And in this consists the improvement claimed by Buck.

Arthur Platt, Adam Powers, and Leonard Duval say there is nothing new in an air chamber, to equalize the heat of the oven. This is no doubt correct; but they do not say there is nothing new in connecting the flues with the extended oven, as claimed by Buck.

The Harris stove, sold in 1836, had the oven extended under the hearth, and only differed from the Buck stove in the connection claimed by Buck. The Lawrence stove, which was constructed and extensively sold in Tennessee, in 1837, with flues similar to Buck's, but there seems to have been no air chamber in front.

Upon the whole, from the evidence before us, the stoves

made by the defendant, or at least some of them, appear to infringe the right of the complainant, and a preliminary injunction is granted, enjoining the defendants from making or vending any cooking stoves made with a combination of flues down the back and under the oven, and connecting at the bottom thereof with a flue or air chamber in front of the stove; and the said defendants are enjoined from making or vending stoves in which said flues and air chambers are so connected at the bottom of said air chamber or flue in front.

DAVID ROOT v. BALL & DAVIS.

To an action for an infringement of a patent right, a plea that the thing claimed to have been invented was in use and for sale before the application for the patent, is demurrable, unless the plea aver an abandonment, or that such sale or use was more than two years before the application.

Where the use or sale has not exceeded two years before the application, the act of the 3d of March, 1839, declares it shall not invalidate the patent.

The same patent can not include inventions for two distinct machines.

But a claim for a combination of mechanical powers, and the invention or improvement of one or more parts of which the combination consists, may be in one patent.

There must be special pleas or the general issue, and notice of special matters;

Mr. Fox for the plaintiff.

Mr. Hart for defendants.

OPINION OF THE COURT.

THIS is an action for an infringement of a patent. The plaintiff declares against the defendants for violating a patent right granted for a design of ornamental parts of a stove, dated 9th of September, 1845, with the ordinary breaches.

The defendants pleaded:

1. The general issue.
2. Because before the date of the patent on the 6th of Jan-

uary, 1844, "stoves constructed upon the plan of the stove patented by plaintiff, with the same general design and combination of the ornamental parts, were publicly made and sold by the defendants at the district, etc."

3. Because before the date of the application for the said letters patent on the 1st November, 1844, and thence on till the date of said application, stoves constructed on the plan of the stoves patented by the plaintiff, with the same general design and combination of the ornamental parts, were publicly for sale by the plaintiff himself, at the district, etc.

4. Because before the date of issuing the patent on the 1st of January, 1845, and thence on to the date of the same, stoves constructed upon the plan of the stove patented by the plaintiff, with the same general plan and combination of the ornamental parts, were publicly for sale by the plaintiff himself, at Cincinnati, etc.

5. Because at the date of application for said letters on Nov. 1st, 1844, and thence till the date of said application, stoves constructed upon the plan of the stove patented by the plaintiff, with the same general design and combination of the ornamental parts, were in public use, and for sale in the city, etc., by the consent and allowance of the plaintiff himself.

6. Because before the date of issuing said letters patent of the plaintiff, on the 1st January, 1845, and thence continually till the date of the patent, stoves constructed upon the same plan with the stove patented by the plaintiff, with the same general design and combination of the ornamental parts, were in public use and for sale at the city, etc., by consent and allowance of the plaintiff himself.

To the 2d, 4th, and 6th pleas, the plaintiff demurred, and joined issue on the 3d and 5th.

The pleas demurred to allege, that before the issuing of the patent, stoves of a similar design and combination were in use and for sale. And this, it is contended, is no answer to the plaintiff's action. By the 7th section of the act of 3d of

March, 1839, it is declared that "no patent shall be held invalid by reason of any such purchase, sale, or use prior to the application for a patent, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

None of the pleas state that the use spoken of was more than two years prior to the application for the patent, and this is indispensable to render the patent invalid. Independently of this statute, the plea would have been bad, as the application for a patent must protect the right of the inventor, and the delay which may occur, in the patent office, in making out the patent, can not operate to the injury of the applicant. On both grounds, therefore, it is clear that the pleas demurred to constitute no bar to the plaintiff's action, as they do not show that the patent is invalid, by abandonment or otherwise. When an abandonment is relied on, it should be stated in the plea, and the facts on which the pleader relies, as showing an abandonment. The present is different from the former law, *Shaw v. Cooper*, 7 Peters's Rep., 292.

The jury were sworn to try the issues joined, and witnesses were examined.

George H. Knight, in September, 1844, was employed by plaintiff to make out the specifications, which are stated in the patent.

Elias J. Peck is a pattern maker, and he says that Root's stove was sold in the fall of 1844. And from other witnesses it appeared that Root's stove was put up early in the year 1845. Several designs were shown to ornament cooking stoves similar to the plaintiff's, but the figures differ.

It is admitted that the application and specifications on which the plaintiff's patent issued, were filed the 15th of December, 1844.

It is objected to the plaintiff's patent that two distinct things can not be united in the same patent. This is true,

David Root & Ball & Davis.

when the inventions relate to two distinct machines. And the reason assigned is, that it would deprive the officers of the government of their fees, and in other respects, would be inconvenient. But the same patent may include a patent for a combination, and an invention of some of the parts of which the combination consists. A patent for a combination is not infringed by the use of any part less than the whole, of the combination. *Moody v. Fiske*, 2 Mason, 112.

It was objected by the defendant, that as a penalty is imposed on a patentee for selling an article unstamped, and as stoves were sold by plaintiff made before the patent, and which were not stamped, the plaintiff could not recover. But the court overruled the motion, saying that the matter stated could have no influence in this case.

The court instructed the jury that, as there was no notice or plea, which authorized the defendant to show a want of novelty in the invention claimed by the plaintiff, they would disregard the evidence which had been given on that head. There is no notice appended to the plea of the general issue to that effect, nor do the special pleas make a want of novelty a ground of defense. They would seem to rely on the effect of an abandonment. Or at least, that the right of the plaintiff did not originate with the discovery, or the application for a patent, but with the emanation of his patent.

And the jury were instructed, if they should find that the defendants had infringed the plaintiff's patent by using, substantially the same device, as ornamental on the same parts of the stove, they would of course find the defendant guilty, and assess such damages, as, in their judgment, the plaintiff was entitled to. To infringe a patent right, it is not necessary that the thing patented should be adopted in every particular; but if, as in the present case, the design and figures, were substantially adopted by the defendants, they have infringed the plaintiff's right. If they adopt the same principle, the defendants are guilty. The principle of a machine is

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that combination of mechanical powers which produce a certain result. And in a case like the present, where ornaments are used for a stove, it is an infringement to adopt the design so as to produce, substantially, the same appearance.

The jury found for the plaintiffs, and assessed their damages at twenty-five dollars—judgment.

ANN C. H. SCHEDDA ET AL. v. NATHANIEL SAWYER.

A person who assumes to act as agent in redeeming land sold for taxes, is held to have acted in that capacity.

And if he shall take advantage of such act, to obtain a title in his own name, for the land, and by a subsequent procedure to perfect the title, he is responsible in the character he at first assumed, and will be held to answer to those in whom the title was vested.

A demurrer to a bill, admitting the above facts, is overruled, and the defendant required to answer.

A title made in the name of a deceased person, under the act of Congress of 1836, enures to the benefit of his heirs.

At common law any act is void, which is done in the name of a person deceased.

Mr. *Stanbery* for complainant.

Messrs. *Taft & Key* for defendant.

OPINION OF THE COURT.

In this case the bill states that on the ——— day of 178— a Virginia Military Land Warrant for two thousand six hundred and sixty-six and two-thirds acres was issued to William Ludeman, for his services, etc., numbered 818, which was deposited shortly after, in the office of the principal surveyor, for entry. That on the 24th of June, 1784, one thousand acres were entered by virtue of said warrant by entry No. 165, in Kentucky, leaving one thousand six hundred and sixty-six and two-thirds acres to be located in the Virginia Military district in Ohio. That in March, 1786, said William Ludeman died, at Richmond, Virginia, leaving a last will

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made 1st March, 1786, by which he devised to his sisters, Christina, Sophia and Catharine Juliana, said one thousand acres certificate; and one thousand six hundred and sixty-six and two-thirds acres of land, which are to be located on the Scioto. That the residue of said warrant, was located in two entries, No. 684 for one thousand four hundred and ninety-four acres, August 7th, 1787, and surveyed May 27th, 1794. And No. 3380 for one hundred and seventy-two and two-thirds acres, 25th August, 1798, and surveyed September 1st, 1798.

That said Christina intermarried with Francis W. Hampe, both of whom are dead, since the death of the testator, leaving heirs, all of whom are complainants. That the said Catharine, after the death of the testator, died, leaving several heirs, who are also complainants. That on the 29th December, 1823, the said entry, 684, was sold for taxes, and penalties, etc., for the years 1821, '22 and '23, to one Joseph Riggs, for forty-nine dollars and eighty-five cents and three mills, and said Riggs received from the county auditor a certificate of purchase.

That about the 9th of August, 1824, the defendant, Sawyer, applied to Riggs to redeem said lands, stating to him that he was the agent of Ludeman's heirs, or of persons acting for them, and seeking to redeem as such agent. That Riggs, on the 9th of August, 1824, received from defendant the amount paid for the taxes, and assigned said certificate to him. That said land was, at that time, worth from two to five thousand dollars. That on the 9th of October, 1824, defendant, to carry out his fraud, presented said certificate to the county auditor, and procured a deed to himself for said land, from the auditor.

That to strengthen his said fraudulent title, defendant, at the March term, 1825, of Adams Common Pleas, filed his bill *quia timet*, against the unknown heirs of William Ludeman, and claiming a decree on the footing of his said tax

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title. And at the October term, 1826, of said Common Pleas, after publication, against said unknown heirs, a decree *pro confesso* passed, that said unknown heirs should release all title to said land to Sawyer, and in default thereof, that the decree should operate as such conveyance.

That about the 23d May, 1829, the defendant obtained from the surveyor of Military district a copy of the plat and certificate of survey, by representing himself as agent for Ludeman's heirs, or by some other means; and on the 26th November, 1830, obtained a patent for said land in his own name. That said decree and patent were obtained by fraud, and by fraudulent statements of the defendant, in order to strengthen his title under the tax sale. That said patent was improperly obtained by defendant; but it conferred on him the legal title which he holds in equity, in trust for complainants.

That afterward, defendant, by representing himself to be the agent for Ludeman's heirs, obtained from the surveyor the plat and certificate of survey made in the other entry for 172 acres, and caused a patent to issue thereon, to William Ludeman, which patent is now in defendant's hands.

That the complainants, and those under whom they claim, have always been out of the United States, and had no knowledge, until within the last two or three years, of the fraud of defendant. That since the date of the patent for 684, defendant has sold to innocent purchasers parcels of said tract, of whose names complainants are ignorant. That large sums are due from such purchasers, etc. And the bill prays for an account, and for land unsold, etc.

The defendant filed a demurrer to the bill.

It is contended the complainants show no title, because the entry No. 684, for 1494 acres, was made Aug. 7th, 1787, and the survey thereof was made May 27th, 1794, all subsequently to Ludeman's death, which happened in March, 1786.

From these facts it is supposed that the entry and survey,

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having been made in the name of a dead person, is void. In the case of *Galt v. Galloway*, 4 Peters, 332, and also in *McDonald v. Smalley*, 6 Peters, 261, the supreme court held that entries in the name of deceased persons were void. But the counsel insists that the court has never decided that a survey executed prior to the act of Congress of the 2d of March, 1807, was void. The proviso in that act is, "that no location, as aforesaid, within the above-mentioned tract, shall, after the passing of this act, be made on tracts of land for which patents had previously issued, or which had been previously surveyed." This, it is urged protected the land from a new location, subsequent to the act.

This will probably be the decision of the supreme court when the question shall arise in that court. It has decided that the entry in the name of a dead man is void, on the ground that at common law, all transactions in the name of a deceased person are void. And it may not be clear of doubt, that the above act of Congress intended to protect a void survey. A survey without a warrant would be literally within the law; and yet such a survey, being a fraud on the government, could hardly claim protection under the act. The case where an entry is made in the name of a deceased person, is not fraudulent—it is only void, having been made in the name of a person who can have no agency in matters which belong to the living.

By the act of 21st May, 1836, Congress have provided that patents issued in the name of deceased persons, shall enure to their heirs, as fully as if the grant had been made to the decedent during life. This is undoubtedly a proper statute, as it relieves from a mistake in behalf of heirs.

But there is another ground on which the complainants may safely rest; and that is, the principle recognized by the court in the case of *Galloway v. Finley*, 12 Peters, 264. The defendant Sawyer, from the statements in the bill, all of which are admitted by the demurrer, whether authorized or

not, assumed to act as the agent of the complainants, or of those under whom they claim, in redeeming the land from the tax sale. And, in view of this question, it is immaterial whether he acted under authority or not. He assumed so to act, and in equity he will be considered as so acting. And he is now estopped from denying the title under which the complainants claim. It is the title under which his title originated. Having, by a most singular course of proceeding, endeavored to strengthen this title, and make it his own, he is not now permitted to impugn it, and still claim under it.

The next ground assumed in support of the demurrer is, that the decree of the court of Adams county is final and conclusive, and can not be impeached collaterally, or in any other mode, except by an appeal or a bill of review.

The answer to this argument is, that the bill alleges that the decree was obtained through fraud. This is the allegation of the bill, and the demurrer admits the truth of it. All judgments may be impeached for fraud. There is no human transaction, however solemn, but what may be impeached on this ground.

It is argued that the bill does not charge an agency in redeeming the land from the tax sale. The bill declares that he represented himself as agent for complainants. Unless he acted in that capacity, having no interest in the land, he had no right to redeem it. He is not only alleged in the bill to have acted as agent, but the act itself shows that he so acted.

The title of the defendant must be considered as a whole, and not as susceptible of being divided into parts. From the statements in the bill, there seems to have been a settled purpose, by the defendant, to possess himself of the land, from the first step, until the right, as he supposed, was consummated by the patent and the decree of the court. If there are any explanatory circumstances, they may be made to

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appear hereafter, and possibly may give a new and more favorable aspect to this case. But, as it now stands, it is a case clear of all doubt. The demurrer is overruled.

COLLINS & SONS v. HOOD, ASSIGNEE.

Equity will not sustain an agreement between partners, if the firm be at the time insolvent, by which the whole property and effects of the firm, are transferred to one member; the effect being to defeat the equitable preference of the firm creditors, and to give the separate creditors of the partner accepting such transfer, a preference to the creditors of the company.

The provisions of the 14th section of the late bankrupt law, directing the mode of settlement and distribution of estates in bankruptcy, in cases of partnerships, are in affirmance of the principles on which courts of equity proceed in the adjustment of the rights of a creditor of a firm, and the separate creditor of each partner.

The creditors of a firm are entitled to the preference of having their debts paid out of the partnership funds, before the private creditors of any of the partners.

The sale and transfer of the partnership property and effects to one partner in the case before the court, is condemned by the 2d section of the late bankrupt law, as made in contemplation of bankruptcy, and with a view to a preference of the separate creditors of the individual members of the firm, to the prejudice of the creditors of the firm.

Mr. *Hunter* for plaintiffs.

Mr. ——— for defendant.

OPINION OF JUDGE LEAVITT.

THIS is a controversy between the complainants, as creditors of the late firm of Wing & Lamb, and the creditors of the individual members of that firm. The bill charges, that a certain agreement, executed by the members of said firm, the 22d of April, 1842, providing for the dissolution of the firm, and by which, all the partnership property and effects was transferred to Wing, as a purchaser, is fraudulent and void as to the creditors of the firm. The prayer of the bill is, that said agreement may be annulled, and the rights of the different classes of creditors settled, as if no such agreement had been made.

The facts which it will be material to notice, as bearing on the points presented for the decision of the court, are briefly as follows: "William Wing and William Lamb, for some years prior to the said 22d of April, 1842, had been associated in business as mercantile co-partners, and at that time, the firm being greatly embarrassed, if not actually insolvent, they entered into the agreement, before noticed. By this agreement, in consideration of all the partnership property and effects transferred to him, Wing agreed to pay his partner the amount of capital invested by him in the concern, being \$6,905 13; and also, the sum of \$2,200, for his share of the profits; and, moreover, to pay all the firm debts, and to indemnify Lamb, on account of his liability for such debts. In the month of December next after this agreement of dissolution, Wing filed his petition in bankruptcy; and some weeks after, Lamb filed a petition for the same purpose. By the decree of the proper court, they were severally discharged under the late bankrupt law; and Thomas Hood, who is made a defendant in the bill, was appointed assignee for each. The assignee has taken charge of their property and effects, and has collected and paid into court about \$4000, leaving a large amount yet to be collected and paid over.

It is insisted by the complainants, that the agreement between these partners is fraudulent and void, and could not operate as a valid transfer of the property and effects of the firm to Wing. And the court is asked to decree accordingly, and that the rights of the different classes of creditors may be settled, as if no such agreement had been made.

There can be no doubt as to the principle on which the rights of the creditors of the firm, and the creditors of the individual partners would have been settled, if the partnership had continued till dissolved by the applications of its members for relief under the bankrupt law, then in force. The 14th section of that law would have controlled the distribution of the proceeds of the property and effects of the

firm, and that of the individual members of the firm. This section authorizes the creditors of the firm, and the separate creditors of each partner, to prove their debts, and directs the assignee to keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof. And it provides, that "after deducting out of the whole amount received by such assignees, the whole of the expenses and disbursements paid by them, the nett proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the nett proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors." It is further declared, that if there is any surplus, after satisfying one or the other class of creditors, that surplus shall be applied to the satisfaction of the class in regard to which there is a difficulty.

These provisions of the 14th section of the bankrupt act, are in affirmance of the principles on which courts of equity have uniformly proceeded, in the adjustment of the conflicting rights of the creditors of a firm, and the separate creditors of each partner. That the creditors of a firm are entitled to the preference of having their debts paid out of the partnership funds, before the private creditors of either of the partners, is a doctrine well settled by courts of chancery. 1 Story's Equity, sec. 675. And any transfer or sale of the property and effects of a firm, which defeats and destroys the preference, can not be sustained in equity. That such is the effect of the agreement between Wing and Lamb, admits of no doubt. It transfers the entire property to Wing; making him the owner in his individual right, and thus prejudicing the rights of the creditors of the firm. It withdraws from them, and places beyond their reach, the property and means to which they have a just right to look for payment; and, if operative, causes such property and means to enure to the benefit of those who have no claim, in equity, beyond the surplus, if any, after the payment of the partnership debts.

That the firm of Wing & Lamb, if not insolvent at the time of the execution of this agreement, was in a condition of great embarrassment; seems not to admit of a doubt. It is true, the master, in his report, arrives at the conclusion that Wing had a surplus of assets, beyond his debts, of about \$10,000. But in this estimate, as the court understand it, no deduction is made from the value of the stock in trade transferred to Wing, for the amount of nearly \$7,000, which he had agreed to pay the retiring partner for his interest in the stock, and the sum of \$2,200 to be paid to him for his share of the profits of the concern. These sums deducted, there would still be a nominal surplus of upward of \$1,000; but when it is considered that of the entire assets of the firm, including the individual property of Wing, the sum of about \$16,000 is made up of outstanding claims due the firm, and necessarily subject to large deductions for uncollectable debts, the solvency of the partner Wing, and his ability to meet the claims against the firm, are more than questionable. In addition to this, it may be noticed, as a further evidence of the embarrassment of the partner Wing, that he was liable, as a member of the previously existing firm of Wing, Ruffner & Co., for a debt of about \$11,000, which is not taken into the account by the master, but must be regarded as affecting the pecuniary standing of the firm at the time of the agreement of dissolution.

The witness Black, who has been examined touching the affairs of the firm, and who had been a clerk in the employ of Wing & Lamb for two years previous to the dissolution, expresses the opinion that the firm would have been able to pay its liabilities, if time had been allowed them for that purpose. This is equivalent to an admission of the serious embarrassment of the company, and in one aspect, of its insolvency. This witness states, that during its existence, eastern debts at maturity, and when payment was urged, were

not paid; and that it is within his knowledge that some of these debts have never been satisfied.

It may be noticed, as a fact warranting the inference of the insolvency of this firm, if not of a design fraudulently to defeat the just rights of creditors, that a few days after the date of the agreement referred to, Wing sold and transferred to Black, who appears to have been without means, the entire stock in trade; and the business was for some time carried on in the name of Black, but as appears from his own admission, really for the benefit of Wing. This arrangement continued till within a few days prior to Wing's application in bankruptcy, when Black surrendered and transferred the property and effects to Wing. There is no explanation of this transaction, redeeming it from the suspicion which the facts so fully warrant. It seems to admit of no other construction, than that Wing, under the pressure of his embarrassments, made the pretended transfer to Black, with a view to defeat his creditors in their efforts to enforce the collection of their debts. The property thus transferred by Black to Wing, on the eve of his application in bankruptcy, was entered on his schedule of property and effects, as owned by him.

These considerations, in connection with the fact that in the autumn following the date of the agreement of dissolution, both Wing and Lamb filed applications in bankruptcy, and thus made the most solemn admission of hopeless insolvency, leave little doubt in the mind of the court, that at the date of the agreement, they were involved in difficulties from which they could have no hope of extrication.

Although, on the well-settled principles of equity, for reasons already stated, the sale and transfer to Wing can not be sustained, it may not be improper to notice that it is clearly condemned by the 2d section of the bankrupt law; and that the present controversy between these parties is so far connected with a proceeding under that law, as to bring

the transaction in question within its scope and operation, there is no room to doubt. By the 2d section of the act, all payments, transfers, etc., made when the party was in a state of insolvency, and which, in their operation, give a preference to particular creditors, fall within its prohibition; and, by a well settled construction, are regarded as made in contemplation of bankruptcy, and as possessing no validity. The transfer of the property and effects of the firm to Wing, under the agreement of the 22d of April, 1842, is clearly within the letter and the spirit of this section. It was made in contemplation of bankruptcy, and in its effect, gave a fraudulent preference to the separate creditors of the individual members of the firm, over the creditors of the firm, thus benefiting the one class, to the prejudice of the other.

Such being the views of the court, they decree the cancellation of the articles of dissolution, and direct that the distribution of the proceeds of the partnership property and effects be made as if no such dissolution had taken place. And if, in carrying out the principles of this decree, a further reference to a master is necessary, that object may be embraced in the decree drawn by counsel.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1847.

HENRY VALLETTE v. THE WHITEWATER VALLEY CANAL CO.

To enforce an equitable lien is the appropriate jurisdiction of a court of equity. The circuit court takes jurisdiction for or against a corporation, from the place where its business is done.

And this sufficiently appears from the face of the act of incorporation.

The citizenship of persons who may or may not afterward apply to be made parties, need not be alleged in the bill.

The rights of persons, not made parties, can not be affected directly by the proceeding in a suit; but a question which is raised between parties, may affect them, as the holders of certain paper.

A complainant may consent to the postponement of his lien in whole or in part, on conditions beneficial to all the parties concerned.

But the court can not change a contract, under any exigency.

Messrs. *Fox* and *Chase* for complainant.

Messrs. *Newman* and *Walker* for defendants.

OPINION OF THE COURT.

THIS is an application for an injunction and the appointment of a receiver.

The bill alleges that on the 20th day of January, 1842, the Legislature of Indiana passed "An act to incorporate the Whitewater Valley Canal Company," with power to make contracts, sue and be sued, and do all things necessary to effectuate the objects of the association. And in the same act, the State transferred to the association all its rights to the line of the canal from the Ohio river to the National Road, at Cambridge, and all the expenditures by the State hereon, on condition that after the lapse of fifteen years, and

after the completion of the canal by the company, the State should have the right to resume the canal, with the privileges granted, "upon paying to said company the full amount of their expenditure upon the same."

Power is given to the corporation to borrow money, and when necessary, to increase the stock of the company, to erect mills and other hydraulic works, to fix the rate of tolls, etc.

After the organization of the company, by the election of its officers, they created a loan for the benefit of the corporation, of one hundred and twenty-five thousand dollars, and for part thereof, issued bonds for the payment of one thousand dollars each, one hundred and twelve of which bonds bearing date 1st of January, 1845, were issued and delivered to the complainant, payable to him or bearer. On these bonds, interest at the rate of seven per cent. was payable semi-annually, at the city of New York, until the payment of the principal sum, which was payable in ten years, being part of the first and only loan of one hundred and twenty-five thousand dollars; and the faith of the company and their effects, both real and personal, were inevitably pledged; and said bonds were to have a preference over all debts that might thereafter be created by the company.

And in default of said payments it was agreed that the holders of the bonds might enter immediately into the receipt of the tolls and water rents, and the incomes of said company, by applying to the circuit or district court of the United States, or any court of justice, to appoint a receiver of the incomes of said company, and apply the proceeds to the payment of the interest on said bonds, etc. And it was agreed, that should the interest have to be collected by legal process, there should be adjudged to the holder ten per cent. as liquidated damages.

The company also executed to the complainant four other bonds of similar character and amount, except as to their

date and time of payment. Two of these bonds are now due, and the other two will be due in July next. That there is now due the sum of five thousand seven hundred and fifty dollars for interest, and also one thousand dollars on the obligation which became due in July, 1847, which it seems the defendant refuses to pay. And the complainant states that the corporation has, within a few months, contracted other debts, and has, in violation of law, caused about seventy thousand dollars in bonds to be prepared to be issued, and has issued about twenty thousand dollars of the same, and threatens to issue the balance thereof for the purpose of being used as a circulating medium, and as a substitute for bank notes, in the form of promissory notes, by which said company promises to pay, two years after date, to — or bearer five dollars, (and other notes from that sum to twenty dollars,) for value received, with interest at the rate of six per cent. per annum; and which notes on their face are agreed to be received by said company, at all times, for tolls and water rents, etc.

And the complainant avers, that the corporation has lands and personal property, debts due, and cash on hand to a large amount. That the corporation owes, as he has been informed, over two hundred thousand dollars. That if the said notes be received in payment of tolls and water rents, the sum due to the complainant as aforesaid, can not be paid; and he prays that the defendant may be enjoined from selling or disposing of any of the real or personal estate of the company, and from issuing or circulating any promissory notes of the character before described. Also from receiving them for the tolls and water rents due and to become due.

In its answer the corporation admits, the organization of the company, the issuing of the bonds and the sum due to the complainant as alleged by him. It states that by a great rise of water in White river, an extensive injury was done to the canal, to repair which ninety thousand dollars were

required. That these injuries, if not speedily repaired, would have been ruinous to the canal. That, failing to raise funds to make the repairs in any other manner, the plan of issuing the promissory notes complained of was adopted. These notes, the defendants insist, are not in violation of law.

Several objections were made to the jurisdiction of the court:

1. That there is a remedy at law.

This is an equitable mortgage, and is a peculiar subject of equity. The objects of the complainant are clearly not attainable at law. He may recover a judgment against the corporation, but its tolls and water rents can not be reached in that form. And it appears, from the face of the contract, these were looked to by the parties as a means of payment. This remedy is incorporated into the contract, and it is a part of it. On the tolls and water rents, therefore, the plaintiff has a lien preferable to all others now shown, which may be enforced in a court of equity, but can not be in a court of law. And this is the main object of the bill.

2. It is also insisted that it does not sufficiently appear that the place where the corporation does its business, is within the State of Indiana. To this it must be answered, that the place where the functions of this corporation are discharged, must, necessarily, be within the State of Indiana. It can exercise no extra-territorial power on this subject. But from the face of the charter, it is seen that the work to be accomplished is within the limits of the State.

3. It is further objected, that the complainant was for himself and others interested, and that it does not appear who those persons are, and that some or all of them, may be citizens of Indiana, who could not come in as co-plaintiffs. If this supposition be true, it would be a sufficient objection to their being made plaintiffs. They are not now plaintiffs, and this objection may be considered when they shall apply to be made so.

4. Again, it is insisted that the rights of the holders of the promissory notes alleged to be illegal are involved, and that they should be made parties.

So far as the question of illegality is concerned, it is not material that they should be made parties. Whether these notes be in violation of law, is distinctly presented by the prayer of the bill, that the corporation should be enjoined from issuing any further notes of similar character, which they are about doing, and which, it is alleged, they have no power to do. As well might it be objected, when a defense is made involving the legality of a promissory note, that the rights of others holding similar notes would be effected. If these notes, now in circulation, are to be treated as valid, and the question is made, whether the payment of them out of the tolls and water rents, as pledged upon their face, the objection that the holders are not made parties, is not without force. In this aspect, the question is one of preference, and that point is not raised in the bill; and it is supposed could not be, unless the holders of the paper were given.

5. The State of Indiana is not a necessary party. Its interest is contingent, depending upon the exercise of its own discretion. And this proceeding can in no respect affect the exercise of that discretion.

The lien of the plaintiff is the first one, as appears from the bonds, and it was expressly agreed that it should be preferred to all others. But, of necessity, there was an implied understanding that the ordinary expenses of the company should be paid. Until this was done, there could be no tolls or water rents to pay out. But this expenditure is limited to ordinary repairs and other expenses, incident to the business of the company. The directors could give no lien, to the prejudice of the plaintiff, beyond this. The work was subject to casualties like other and similar works, but no provision was made for extraordinary expenditures. When these became necessary, as under the circumstances stated in the answer, the directors

should meet them, if possible, by the use of other means than those which were mortgaged to the plaintiff. They had lands, debts due for stock and otherwise, and they had power to increase the stock of the company. If these should not be available, after a full trial, and a pledge of the receipts for tolls and water rents was the only means to raise the money to make the repairs, within the power of the directors, it was a subject rather of compromise between them and the complainant, than of legal discretion on their part. The lien may have been given to the complainant injudiciously, but it was given under an emergency as strong, and indeed stronger, than that which now exists. The means afforded by the plaintiff enabled the company to accomplish the enterprise. The lien given to him induced him to part with his money, and no change of circumstances in the affairs of the company can authorize a postponement of the lien.

The interest of the parties in this case is identical. Unless the canal can be repaired, the expenditures of the company will be lost, and the work in a short time become of little or no value. And in this event the claim of the plaintiff must fall and become as worthless as the stock of the company. It would seem, therefore, in reason and policy, that the future receipts of the company should be used to make the repairs now being made, so far as may be done with a proper regard to the interest of the plaintiff. And he voluntarily proposes to postpone his lien for ninety days, provided the receipts of tolls and water rents, during the ninety days, shall be applied to the completion of the repairs. And after the expiration of the ninety days, he consents to receive one-fourth of the receipts for toll and water rents.

Beyond the ordinary repairs of the canal and the expenses of the company, it can create no demand which shall directly or indirectly postpone the lien of the complainant. The faith of the company is not only pledged for the priority of his lien, but its entire property, and especially the receipts for

tolls and water rents. The tolls and water rents are not only pledged equitably, but they are set apart as the means of payment. This being the contract, the company can not change it, nor can the court do so. Courts of equity do not make contracts, but enforce them. As the complainant, however, has consented to the postponement of his lien, as above stated, that all the means of the company may be applied to the repairs now being made, all difficulty on this point is obviated.

The sale of the lands of the company for its stock, lessens so much of the property mortgaged to the plaintiff; the lien extended equally to the stock and the land, though the stock was held by individuals; the exchange of the land, therefore, for stock, did not add to the amount of stock, but reduced the subject of the lien to the amount of land sold. This the plaintiff may object to, as it lessens his security.

The promissory notes of small denominations, printed on bank paper, and containing a promise to pay, with interest, a certain sum, and receivable for tolls and water rents, signed by the president and secretary of the company, being evidently intended for circulation, are clearly within the act of Indiana of the 20th January, 1841.

Upon the whole, I think the complainant is entitled to the prayer of his bill, to enjoin the corporation from issuing notes of the denomination above stated, and from receiving such notes already issued in payment of tolls, water rents, or other dues; also from selling any of the real estate now held by the corporation for its stock. And after the canal from Cambridge to the Ohio river shall have been in operation from this time, three months, the receipts having been faithfully applied to the completion of the necessary repairs, the company is required to set apart one-fourth of the receipts for the payment of the plaintiff's demand; and that the same shall be paid to the plaintiff, or deposited in the Lafayette Bank of Cincinnati, subject to the order of the court.

And it is further ordered, that the corporation shall, by its

proper officer or officers, make a report to the next circuit court of the United States, to be held in the State of Indiana, stating the receipts and expenditures of the company from the time this injunction is allowed up to that term, and that another report of the same character be made at the succeeding term of said court, if the plaintiff's demand shall not be discharged before that time.

A receiver will now be appointed. And I take occasion here to remark, that I have no doubt the company has acted, under the exigencies in which it was placed, with a sincere desire to advance the general interests of the association and the public.

CATLIN v. UNDERHILL.

To make a sworn copy evidence, the witness must state that he compared the copy with the original.

A surrogate acts as a clerk in certifying his proceedings, and as he also acts in the capacity of judge, he must certify as to the authentication under the act of Congress.

Mr. *O'Neal* for plaintiff.

Mr. *Yandeas* for defendant.

OPINION OF THE COURT.

THIS case is brought before the court, by consent of the parties, to submit certain questions on the admissibility of evidence.

Charlton Ferris being sworn, says, that the annexed exhibit A. contains the letters testamentary, the copy of the will, the certificate of the surrogate and the proofs thereon, and a certified copy of the oath taken by the witness upon taking out said letters testamentary. Witness states that he has acted as such executor ever since he was so qualified, and still continues to act.

Rockhill v. Hanna, late Marshal.

This, it was contended, proved the will and other papers as sworn copies. But the witness does not swear that he compared the copies with the record; and, therefore, they can not be received as sworn copies.

The surrogate before whom the will was proved, and who granted the letters testamentary, certified under his official seal, to a copy of the will, letters, etc., and proof of the will. But there was no certificate of the presiding judge, that the attestation was in due form, and for this defect the copies are objected to. The surrogate acts as his own clerk, and certifies under his seal, but he also acts in the capacity of judge, and, consequently, had a right to certify. He keeps a record, and the court held that copies must be authenticated in the form required, to make them evidence.

The act of Congress of 1790 provides, "that the records and judicial proceedings of one State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form."

The papers offered, not having the required authentication, can not be admitted in evidence.

ROCKHILL v. HANNA, LATE MARSHAL.

The plaintiff is not bound to give oyer of an instrument, of which he is not in possession; and which is as accessible to the defendant as to the plaintiff.

Mr. *Morrison* for plaintiff.

Mr. *Smith* for defendant.

OPINION OF THE COURT.

THE defendant prayed oyer of the bond, etc. But the

court held that as the plaintiff was not in possession of the instrument, oyer could not be demanded. 2 Dall. 332. The action is not on the bond. No profert is made of it. It is on file in the clerk's office and recorded by him, and equally accessible by both parties. The court, therefore, held that the plaintiff was not bound to give oyer.

PRICE AND PRICE *v.* TEAL.

Where a note is given in Indiana payable in New York, with interest and the rate of exchange, the rate of exchange will be, the time the note becomes due.

Mr. *Yandees* for plaintiff.

OPINION OF THE COURT.

THE action was brought on a promissory note, payable in New York, with interest and the rate of exchange. The court directed the jury to calculate the exchange on the amount due on the note, at maturity, and not the exchange as it might be at the trial.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JUNE TERM, 1847.

GIER v. GREGG & WALD.

A case removed from a State court, to the Circuit Court of the United States, stands, in the latter, as it did at the time of the removal in the former.

If an amendatory answer repeat what was said in the answer filed before, without varying the defense, it may be considered as impertinent, and will be referred to a master, etc.

Mr. *Butterfield* for plaintiff.

Mr. *Chickering* for defendant.

OPINION OF THE COURT.

THIS case was brought here from the circuit court of the State, and it is now before the court on exceptions to the answer. Leave was given at the last term to amend the answer.

The counsel for the defendant contends that nothing is brought from the State court into this court, under the act of Congress, but the process. The case, when removed from the State court to the Circuit Court of the United States, stands in the latter court as it stood in the former, before the removal.

The objection to the answer to the amended bill is, that it repeats what was said in the answer previously filed.

In Story's Ch. Pl., sec. 868, it is said, that an answer to an amended bill is considered a part of the answer to the original

bill. Therefore, if a defendant, in a further answer, or in an answer to an amended bill, repeats any thing contained in a former answer, the repetition, unless it varies the defense, in point of substance, or is otherwise necessary or expedient, will be considered as impertinent; and on reference to a master, such parts will be struck out.

In sec. 875 the author says, "It may well be suggested whether the plaintiff has a right to dispense with the oath, and yet to make the answer evidence in his own favor as to all the facts which it admits, and exclude it as evidence as to all the facts which it denies. It would seem that the whole answer should be taken together, at least so far as one part may be explanatory of another, or have a direct bearing upon it.

The court referred the answer back to the master, to state what part of the former answer, if any, is a full answer to the interrogatories in the amended bill.

WM. R. VOCE v. G. LAWRENCE.

A judge of a court, having a right to administer oaths, may administer them in any county in the State.

He certifies that a deposition was taken before him, etc. Now a deposition is not properly so called, which is not signed by the deponent. The signature being on the deposition, it was not essential that the judge should certify the fact more particularly as to the signature, than that the deposition was taken before him, and written by him.

A mistake in the name of the plaintiff or defendant, aforesaid, referring to him as plaintiff or defendant, the name being truly stated in the title, is no ground for rejecting the deposition.

The distance, as proved, is more than one hundred miles from the place of taking the deposition, to the place of trial.

Messrs. *Lincoln* and *Goodrich* for plaintiff.

Messrs. *Butterfield* and *Collins* for defendant.

OPINION OF THE COURT.

UNDER the rule of court, certain objections are made to the mode of taking and certifying depositions, before the jury are sworn.

1st objection. "Because John L. Stevens, a judge of the county of Orange, took the depositions in Palermo, in the county of Oswego."

This fact is proved by affidavit. The act of Congress provides that "depositions may be taken before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of any county court of common pleas, or of any of the United States."

2. Because the officer taking said depositions does not certify the distance that plaintiff resided, from the place where the deposition was taken.

3. Because in the deposition the cause is stated by a wrong title.

4. Because the distance is not stated to the residence of the defendant and his attorney, from the place where the deposition was taken.

5. Because the deposition of Jennings, the officer, does not certify that the witness signed it.

6. The same objection is made to the deposition of Wm. B. Burt.

In regard to the first objection, as to the residence of Judge Stevens being in a different county from that in which the deposition was taken, it does not show that he had not power to take it. He was judge of a county, and, as such, had power to administer oaths, any where within the State, although his judicial functions may have been limited to the county of Orange. He is a judge within the act of Congress, as authorized to take the deposition.

The distance that plaintiff and also his attorney resided from the place of taking the deposition was such, as proved,

as to supersede the necessity of giving personal notice of taking the deposition, under the act of Congress. And this disposes of the second and fourth objections.

The third objection is, that the name of the plaintiff was erroneously stated, in the deposition. The word Anderson was used instead of Vorce in the body of the deposition, but this caused no uncertainty, as reference is made to the plaintiff—his name being correctly stated in the title of the case. "Anderson, the above plaintiff," could not mislead any one.

In the fifth objection it is urged that the officer does not certify that the witness signed the deposition. And the same is stated in the sixth objection.

The judge certifies that the preceding deposition was reduced to writing by him and that he was not counsel or attorney for either of the parties to the said suit, and that he was not interested in the event thereof.

The case in 1 Peters, 355, is relied on by the defendant. The certificate in that case stated "that the witness, being cautioned and sworn to testify the whole truth, did subscribe the foregoing and annexed deposition, after the same was reduced to writing by him in his own proper hand," was rejected, because it was not testified or proved that the deponent wrote the deposition in presence of the justice.

The fact of writing the deposition, in the above case, it seems, was not proved. Great strictness in the proceeding under the act of Congress, is required. Indeed, some of the cases have been carried so far as to be rejected by the common sense of every reader. Still, as the procedure is an *ex parte* one, the act should be strictly construed.

Within the meaning of the act there can be no deposition which is not signed by the witness; and the officer in the above case certifies that the deposition was reduced to writing by him. The whole, then, was done in his presence, and the signature of the witness is on the deposition. Now, unless we presume against the integrity of the officer, the witness signed

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the deposition. It was his signature that made it a deposition. Without it, it was not a deposition. And the officer certifies the deposition was taken before him.

The objection is overruled.

There is another objection, because, the order to take the deposition of Lucy Owen, required it to be taken on the 18th of June, and the oath of the defendant was not administered until the 17th of the same month. This does not affect the taking of the deposition.

Objections overruled.

SMITH, MURPHY & Co. v JOHN HARTWELL.

A judgment will not be set aside on motion, if entered under a power of attorney, before the obligation becomes due.

Messrs. *Thompson* and *Lincoln* for plaintiff.

Mr. *Warren* for defendant.

OPINION OF THE COURT.

On the 11th November, 1846, John Hartwell executed a bond to the plaintiffs, in the penalty of eight thousand dollars, conditioned for the payment of four thousand in one year year from the date. On the same day, a power of attorney was executed by Hartwell to Sibley, or any other attorney at law, authorizing him to appear in any suit brought or to be brought against said Hartwell, at the suit of the plaintiffs, on said obligation, as of any term or time, past, present, or any other subsequent term or time, there or elsewhere to be held, and confess judgment thereupon against me, the said Hartwell, for the sum of eight thousand dollars, etc. In December, 1846, by virtue of the above warrant, a judgment

was confessed by E. A. Thompson, an attorney at law in this court, for eight thousand dollars; and a *remittitur* at the same time was entered for upwads of five thousand dollars, so as to reduce the judgment to the sum due. And a motion is now made to set aside the judgment, on the ground that it was entered on the bond before it was due.

Affidavits were read, showing the transactions between the plaintiffs and defendant, and the amount due.

The court set aside the judgment, on the ground that there was no appearance, and the judgment was entered prematurely. There was no appearance by the defendant. The bond was a part of the power of attorney. From the facts, the court have no doubt that the attorney acted in good faith.

UNITED STATES v. HEIRS OF DUNCAN.

Where there are two liens on the same land, one being paramount to the other, which also covers other lands in the State, the court will order the lands to be sold, reserving the application of the proceeds for the order of the court.

Mr. *Butterfield* for plaintiffs.

Mr. *McClure* for defendant.

OPINION OF THE COURT.

JUDGMENTS were obtained in this court in 1841, which are a lien on the lands of the ancestor of the defendants, throughout the State. In 1846, there was a decree against the same, in favor of the plaintiffs, for forty-nine thousand dollars.

Certain judgments have been subsequently entered against the same person, in Morgan county State court, for about six hundred dollars, which create a lien upon the lands in that county. Executions have been issued on the judgments of the United States, and a motion is now made to direct the

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other lands of Duncan's heirs in the State, to be sold, in satisfaction of the judgments and decrees above stated. 1 Paige Rep. 185; 19 John. Rep. 498; Peters' Stat. 1 vol. 515.

The court order, that should the land in Morgan county sell for more than the amount of the judgments of the United States, entered in 1841, the solicitor or agent of the United States, shall retain in his own hands such surplus, subject to the order of this court. Or, should such lands sell for less than the balance of said judgments, and the other lands subject to the decree shall sell for more money than the amount of such decree, the surplus shall be held by the solicitor and agent of the United States, subject to the disposition of the court.

GREGG AND WALD v. GIER.

Motion by plaintiffs' counsel to increase the damages laid in the declaration. Mat. p. i. 153.

OPINION OF THE COURT.

UNDER the act of Congress, as well as in pursuance of the State practice, this court has always exercised a liberal discretion in giving leave to amend the pleadings. This power of the court is not limited, as by the common law, to permit amendments only where there was something in the proceedings to amend by. The motion is granted.

LAFAYETTE BANK v. STATE BANK OF ILLINOIS.

A cashier of a bank which, by its charter, is authorized to deal in bills of exchange, may assign or accept such bills as the agent of the bank.

This is the general custom of banks.

Where a bank agrees to pay the face of its bills, there can be no usury.

To constitute usury there must be a corrupt loan of money.

Lafayette Bank v. State Bank of Illinois.

A purchase of notes of a bank or of individuals, at a discount, is not usury.
 A bank would destroy its credit by purchasing its own bills at a discount.

Messrs. *Logan, Williams and Lincoln* for plaintiffs.
 Mr. *Bledsoe* for defendant.

OPINION OF THE COURT.

THIS action was brought to recover certain bills of exchange indorsed to the plaintiff by J. H. Lee, the cashier of the State Bank of Illinois. The first bill was drawn by Reynolds and Ensminger, for three thousand dollars, payable four months after date, in favor of J. A. Lee, cashier, dated November 17th, 1841. The second was for two thousand dollars, and the third and fourth were each for three thousand dollars.

These bills were assigned to the Lafayette Bank, for the payment of a balance due to that bank by the defendant, including a certain amount of bills which were handed over to the cashier, at the time of the indorsement. The bills were forwarded, at first, to the Lafayette Bank for collection, but they were indorsed for value received before due.

At maturity the bills were not paid, and there was proof of demand, protest and notice. Mr. Ridgeley, being sworn as a witness, stated that at the time of the transaction, the bills of the State Bank were greatly depreciated, and were not worth more than fifty cents in the dollar.

The first ground of defense assumed is, that the cashier of the State Bank had no power to indorse the bills to the plaintiff. That he was a mere agent, and as such, could not make a transfer of the property in the notes. 14 Mass. Rep. 180; 17 Ib. 97; Chitt. on Bills, 199.

It is admitted, that a mere agent can not transfer a note to a person who has notice of his agency. But every bank, authorized to deal in bills of exchange, and there are few who are not so authorized, the cashier receives such bills, and negotiates them. This is in the scope of his agency, and it

is sanctioned by universal usage—or a usage that has very few, if any, exceptions.

The trade in bills of exchange, is the most profitable business of a bank, and such bills, if payable to the bank at New York, are indorsed by the cashier, whether forwarded for collection or negotiated. There is no other officer of the bank to whom this duty belongs. And the usage is sufficient to hold the bank responsible for the acts of its cashier. He is the officer who has the care of the funds of the bank, and whose acts in the performance of his duty, is binding upon the bank.

But this contended, the Lafayette Bank had no power to buy bills of exchange. In the charter of that bank, there is power given to buy bills of exchange upon banking principles. If the bank has the power, it is answered, it can not collect depreciated funds with which to purchase bills. Potier says, money must be paid for them. Story on Bills, 43. Depreciated as the notes of the State Bank may have been, they were at least as good as the bills under consideration. But this, it is admitted, does not test the principle. The State Bank was, no doubt, desirous of sustaining its credit, and especially with banks whose confidence would be of great value to it.

It would be a most singular principle on which a bank could evade its obligations, by depreciating its own notes. The Lafayette Bank, by the confidence it reposed in the State Bank, received its bills and its drafts, which greatly conduced to sustain its credit; and the bank acknowledging its obligations, received bills, and paid its indebtedments on other grounds, by a transfer of these bills. Is it for a bank to say it will not pay the face of its bills in circulation; but will pay nothing more than the specie value of its bills in the market? This would afford a strong inducement to every bank, to discredit its own bills, that it might speculate on the loss of the bill holders.

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But a ground still more untenable than this, if possible, is assumed, and that is, that the Lafayette Bank has, in this transaction, committed usury.

Is not a loan, a corrupt loan, essential to usury? The bills were indorsed for the payment of a debt. Now suppose the bills had been purchased for one third of the amount called for on their face, would that be usury? Certainly it would not, if it was a purchase. When any subterfuge is resorted to, a purchase or anything else, as a cover to usury, it is admitted that the device does not exempt the act from usury.

But, in this transaction, there is no pretense that there was any subterfuge or device, to make the thing appear in any other character than that which belonged to it. It was an open and a fair transaction. An exchange of indebtedments, by balancing the one against the other. It has no analogy to the case of Owens referred to, reported in 2 Peters, 527.

The jury were directed to find the amount of the bills and interest for the plaintiff, which they accordingly did.

JOSHUA J. MOORE v. BROWN ET AL.

In selling lands for taxes, the requirement of the statute must be complied with.

And this especially applies to the giving of notice of sale.

A deed for lands sold for taxes, which, upon its face, shows that legal notice of the sale was not given, is void.

Such a deed can not avail a person who sets up a defense under the statute of limitations.

Messrs. *Williams* and *Butterfield* for plaintiffs.

Messrs. *Logan* and *Lincoln* for defendant.

OPINION OF THE COURT.

THIS is an ejectment for the south half of section 35, town 12, range 1, in Warren county, of this State.

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Patent to Amos Davenport for the land. Deed from him to Dewy. This deed was objected to, because the acknowledgment is defective. The person taking the acknowledgment does not certify that the person making it was known to him. Revised Stat. Ill. 45, page 106, it is provided that a deed for land in Illinois, executed in any other State, "in conformity with the laws of such State," shall be good to convey real estate in Illinois. The deed objected to was executed in Vermont, and the law of that State, it is believed, does not require, as in New York, and in some other States, the person taking the acknowledgment to certify that the one who makes it is known to him. Dewy conveyed to Cole, and he to the plaintiff.

The defendants admit themselves to be in possession, and they set up in defense a sale of the premises for the taxes of 1821 and 1822, on the 9th December, 1823. The act of the State requires the taxes to be paid on or before the 1st of October, annually, and if not so paid, the auditor is required to have the lands published three weeks, the last publication to be sixty days before the sale. The act of 1835 limits a suit to seven years after adverse possession.

It is not denied, but admitted, that the land was sold for taxes before the expiration of the time required by the law, before it should be sold, and the question arises, whether under such a title, the occupant can set up the statute of limitations. It must be admitted, that to entitle an occupant to plead the statute, he need not have an effective deed. This would dispense with the statute, for it is only beneficial to the tenant when his title is not paramount to that of the plaintiff. But here the question is, whether a deed void upon its face, can enable an individual to avail himself of the statute.

A strict construction has uniformly been given to tax titles. It is necessary that, at least the requisites of the law, through which an individual is divested of his title, should be sub-

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stantially complied with. We see the necessity of this rule, in the case under consideration. Three hundred and twenty acres of land have been sold for less than twenty dollars. If such sacrifices can be made, where there is a departure from the requirements of the law, there is no safety to the owners of real estate in Illinois, especially if they be non-residents.

But this rule should not be so technical as to render a sale for taxes of no value. It is the duty of the land holder, resident or non-resident, to contribute his proportion to the revenues of the State, by which public improvements are made, and the value of the property of the people is greatly enhanced. And every non-resident who fails to pay his taxes should be made to suffer for a disregard of his own interest, as well as the interest of the State. But there is often difficulty in procuring faithful agents. If sales for taxes were made with more care, and a stricter observance of the law, it would give a higher value to those sales, and fewer sacrifices would be made.

We suppose that the deed before us is void upon its face. The law requires a notice to be given, before the sale, which the face of this deed shows has not been given; it is therefore void, and can afford no protection, under the act of limitations. Verdict for plaintiff. On suggestion of the counsel, the above question was certified to the Supreme Court, as to the validity of the deed.

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Under the revenue law of Illinois, passed February 26, 1839, (the circuit court acting as a court of limited and special jurisdiction,) it is necessary to show that everything was done, and how done, that is required by law to be done, to give it jurisdiction.

A collector of taxes must make a *demand* for taxes upon the owner of land, before a judgment can properly be rendered against it.

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THIS was an action of ejectment. The defendant pleaded a special plea, setting up a tax title, acquired since the commencement of the action; in which plea he set out fully the record of the judgment of the Peoria circuit court against the land; the collector's report, on which judgment was rendered, together with notice and certificate of the publication thereof; the process or precept under which the land was sold by sheriff, and his deed from the sheriff to the land in controversy.

The collector's report was in the following form:

Patentees.	Description.	No. of acres.	Valuation.	Taxes.
Henry Martin,	do 9 N 7 E N E 11 do do do	100 do do	do 960 do	do 4 32 do

The costs already accrued on each of the foregoing tracts of land and town lots, are twelve cents.

Then follows the notice and certificate of publication, signed by John S. Zeiber, and indorsed on the back was a certificate of the collector, that said lands, etc., were assessed for taxes for the year 1842, for State and county purposes; that the taxes and costs thereon remain due and unpaid, and that the owners had no goods and chattels in his county on which he could levy for the payment of the same. The judgment and precept were in the form prescribed by statute.

To the defendant's plea, the plaintiff filed a demurrer, alleging for cause, the want of jurisdiction in the circuit court to render said judgment, upon the facts set out in said plea. It was further agreed by the counsel, for the purpose of trying the question fully and fairly before the court, that the same objections might be made upon the demurrer, that could have been made to the record, etc., if the same were *offered in evidence*.

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The following were the points made by the counsel for the plaintiff:

1. The record does not show that any demand was ever made by the collector for the payment of taxes, etc.

2. The judgment is void, being for a greater amount of taxes than the court was authorized in rendering by the law, and by the facts before the court.

Messrs. A. Williams and B. S. Edwards for the plaintiff.
Messrs. O. Peters and E. N. Powell for defendant.

OPINION OF JUDGE POPE, (JUDGE M'LEAN ABSENT.)

This is an action of ejectment—special plea, setting up a tax title, under the act of the Legislature of Illinois, of the 26th February, 1839, “concerning the public revenue.” The defendant exhibits the proceedings before the circuit court of Peoria county, the judgment, execution, sale and deed by the sheriff; also, the report of the collector, giving a list of the land; that the owner had no personal property out of which to levy the taxes, and notice that he would move for judgment against the land upon which the taxes were due and unpaid. To this plea the plaintiff demurred.

When I consider the vast amount of property depending upon the question involved in this suit, I can not but feel the immense responsibility I incur: and this feeling is increased by the fact that my construction of the law is in conflict with that of the supreme court of Illinois, to whose *decisions* it is my duty to conform. I shall not attempt to overturn any of its decisions; but I dissent from its reasoning. That court allows great latitude of presumption in favor of the acts of the officers and persons engaged in the collection of taxes; I, on the contrary, hold them bound to show that they have acted in strict compliance with the law from which they derive their power. That court holds that some of the requirements

of the law are *directory*; while I hold them to be material and essential.

The defendant claims to hold the land in controversy (valued by the assessor at nine hundred and sixty dollars,) by virtue of a sale, at which he paid less than five dollars for it. This, then, is a claim of strict right, where a court would not grant a new trial; nor would a chancellor enforce such an unequal bargain.

But it is said that the State must raise taxes; and that can not be done unless the courts give to the sales a liberal support. This has not been found necessary in other States, or by the General Government, and yet their faith has not suffered. Purchases of tax titles have been esteemed a good investment; for if the land be redeemed, it must be on the payment of a hundred per cent., and if not, the owner of the land almost always is willing to extinguish the tax title by paying a premium upon the advance. By the 8th article of the constitution of Illinois, sec. 8, it is provided that no man's property shall be taken from him, but by the judgment of his peers, or the law of the land. The 20th section, same article, declares that "the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession."

What is a tax? It is not a debt. It is a contribution or contingent, which the citizen should pay to the support of the government under which he lives. It is the right and duty of the government to ascertain its amount, and make requisition therefor. This is done by making an estimate of the expenses of the government, the value of each one's property, and levying the tax accordingly. To accomplish this, legislation is necessary.

So the people of Illinois, represented in General Assembly, by the act of 26th February, 1839, consented to a tax of twenty cents on the one hundred dollars' valuation of their property, and also that the county commissioners' court might

levy a tax for county purposes, not exceeding fifty cents on the hundred dollars, if the court should deem it necessary to defray the expenses of the county.

The tax is to be collected. The Legislature prescribes the *modus operandi*. One or more assessors for the county are to be appointed, whose duty it is to call upon each property holder for a list of his property—if not at home, a notice in writing must be left at his house, with some one over twelve years of age, notifying him to attend at some time and place specified in the notice, to give him a list of his taxable property. The list must be returned to the clerk of the county commissioners' court, and shall contain the names of the owners, with the valuation annexed to each piece of property.

The next step is the appointment of a suitable person to act as collector; (this is the language of the law.) He is to call on the property holders for their taxes. If not paid, the tax payer is allowed twenty days to make payment, before the collector can employ coercion. This demand converts the tax into a debt, requiring the debtor to seek his creditor. The tax payer could rest secure until the collector made the *demand*, which alone could put him in default. Without demand, and neglect or refusal to pay the taxes within twenty days, the collector could not proceed to levy on his goods and chattels, nor report him or his lands to the court as delinquent. When the tax payer shall have failed to pay on demand, or in twenty days thereafter, the collector may levy on his goods and chattels; and if he can find none, then he may return or report against the land to the court, and move for judgment.

It is here proper to pause on the inquiry, what is necessary to happen before the owner can be reported to the court as being in default, and the motion made for judgment against his land? I answer, 1st. The assessor must have listed his property for taxation. 2d. He must have valued it. These two facts are material and essential; because, without them,

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no tax could be levied, as no one but the assessor could take the list or value the property: without valuation no tax could be collected. In addition to this, two other facts are equally material and essential, viz: 1st. *Demand* by the collector. And 2d. In default thereof, the collector must have levied on goods and chattels, if to be found. If all these things have been done, then the owner is in default. The collector is ready to bring his suit in the circuit court. The manner of doing this is to give notice of his intention to move for judgment for the sale of the delinquent property, and he is to make a report to the court. The 25th section gives the form of the list to be reported, but not of the facts to show to the court that the lands are subject to its jurisdiction. Those facts are to be found in the requirements of the law. Without the allegation of the necessary and material facts, to be set out in the report of the collector, the court can not render judgment.

For the present, we will suppose that the collector reported to the court that the assessor *listed* and *valued* the property; that he (the collector) demanded the taxes, which were not paid; that he then sought in vain for goods and chattels of the owner—what faith and credit should the court bestow on the report? In other words, should the court require the facts to be proved, or receive them as true until the contrary is shown?

This is a grave question, upon which I do not feel myself called upon to express an opinion. When it becomes necessary for me to pass upon it, I hope my health will be better than it is now.

It may not be out of place here to make some suggestions in regard to it. The faith and credit to be bestowed on the report of the collector, depend upon the character of this personage, who is appointed as a *suitable person* to act as collector. Is he a common law officer of any court? No. Does he form any part of the machinery of the common law? No.

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Are his duties general and permanent, or special and temporary? Special and temporary. Is his responsibility general or special? Special: this is to the State. His bond can only be sued for the use of the State. Is he not then an agent appointed by the State, for a particular object, and when that is accomplished, his agency ceases? Are not such agents bound to show that they have performed their duty, and how they have done it? But enough of this. These suggestions are thrown out only to awaken inquiry.

I suppose the notice of the collector must be regarded as the process to bring parties before the court—the report of the collector, the declaration. Now, what must appear in a declaration? I answer, the facts essential to a recovery. It is impossible to *presume* that the court had proof before it, of any material fact not alleged in the declaration. Where the parties are properly before a court of common law jurisdiction, and the court is silent in regard to the evidence upon which it rendered its judgment, it will be presumed that the court had proof of the truth of all the allegations of the declaration, but none other. It will not be supposed that the court admitted, and acted on any matter *de hors* the declaration.

In the case at bar, the report of the collector avers the existence of only one of the material facts deemed by this court necessary to a recovery, namely, that he could find no goods and chattels upon which to levy—omitting to state, unless inferentially, that the assessor *listed* and *valued* the property, and omitting altogether any allegation of *demand* and refusal to pay the taxes.

But the circuit court does not allow the presumption, that it received proof of the facts omitted in the report, because it expressly bases its judgment upon the report alone. It must be held, that the omission to state a fact material and essential to a recovery, is proof that it does not exist; therefore, no demand for the taxes was made by the collector.

Hence, a judgment rendered upon that state of facts, is on an immaterial issue, and therefore inefficacious, even if rendered by a court of general common law jurisdiction.

It is worthy of note, that the 48d section, which enumerates certain facts, some *prima facie*, and some conclusive, which are proved by the sheriff's deed, does not include in either class, *demand* by the collector. The existence of that *fact*, then, is not proved by the deed. That it is *material* and *essential* is too manifest to require proof. Indeed, it would be an insult to common sense to offer it.

The court might here dismiss the subject, by deciding that the judgment and subsequent proceedings are void, because *coram non judice*, and therefore no defense to the action.

It was argued for the defendant, that this is an action *in rem*, not *in personam*. The court does not see what conclusion can be drawn from this position; for, whether *in rem* or *in personam*, the case must be brought legally before the court, before it can take jurisdiction, either of the *thing*, or person.

It was also urged, with an earnestness indicative of sincerity, that, admitting the judgment to be erroneous, it is still binding until reversed, and a sale on the execution will be sustained, and the purchaser hold the property, even if the judgment be afterward reversed. However this may be, where the court has jurisdiction by having the *person* or *thing* properly before it, it does not hold, where the court has not jurisdiction; a judgment in that case is void—a perfect nullity; and this is the case at bar. The circuit court had no jurisdiction.

The 48d section gives a force to the sheriff's deed truly alarming. It takes from the man whose property has been sold, almost all defense. It matters not how corruptly or negligently the assessor and collector may have acted, he can not defend himself unless by making it appear that the land was not liable to taxation, that the taxes were paid, that the land was not listed and assessed for taxation, etc., etc.

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I advert to this section, to show how imperative it is on courts to exact of the ministerial officers, the greatest strictness in the performance of their duties, and require full proof that they have performed all the requirements of law, and *law*.

But, it is said that some of the requirements of the Legislature are only directory, and may be dispensed with. Upon this, it may be remarked, that a judge should rarely (if ever) take upon himself to say that what the Legislature required, is *unnecessary*. He may not see the necessity of it, still it is unsafe to assume that the Legislature did not have a reason for it; perhaps it only aimed at uniformity. In that case, the judge can not interfere to defeat that object, however puerile it may appear. It is admitted that there are cases where the requirements may be deemed directory. But it may safely be affirmed that it can never be, where the act, or the omission of it, can by any possibility work advantage or injury (however slight) to any one affected by it. In such case it never can be committed.

Does the circuit court, when executing the revenue law, act as a court of common law? It does not. It acts as a court of special and limited jurisdiction, and subject to the rules that govern courts of that character. The supreme court of the United States has so decided in the case of *Thatcher v. Powell*, 6th Wheat. Rep. 119. In that case, Chief Justice Marshall, in delivering the opinion of the court, says: "In summary proceedings, where the court exercises an extraordinary power under a special statute, prescribing a course, we think that course ought to be exactly observed, and those facts, especially, which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*." "Previous to an order for the sale of lands for the non-payment of taxes, the sheriff is ordered to levy them by distress and sale of goods and chattels of the delinquent; and if there be no such goods and chattels, he is to report the same to the court, as the foundation of any proceedings against the lands. By this act no jurisdiction is given to the court over the lands of

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a person who has failed to pay his taxes, until the sheriff shall report that there were no goods and chattels out of which the taxes may be made."

It was urged in that case, that although the judgment might be erroneous, yet it was binding until reversed; but the court held it void. The court held, also, that it must appear that due notice was given. That case arose in Tennessee. There the report was made by the sheriff, a common law officer, and an officer of the court. In the case at bar, the report was made by the collector, not an officer of the common law, or of the court. In that case, the sheriff was held to a strict performance of his duty, and to afford evidence that he had done so.

In the case of *Walker v. Turner*, 9 Wheaton's Rep. 541, the Supreme Court of the United States says, "if the judgment be void, an execution or order of sale founded on it, is also void." Again, the same court, in the case of *Williams et al. v. Peyton's lessees*, says: "In a sale of land for non-payment of taxes, the marshal's deed is not even *prima facie* evidence that the pre-requisites required by law have been complied with, but the person claiming under it must show positively that they have been complied with." The same doctrine has been maintained in Missouri, Indiana, Ohio, Virginia, and most of the other States. Indeed, no departure from it, or conflict with, has been shown to this court in the argument, and none is supposed to exist.

It was contended at the bar that although the judgment is erroneous, still, until reversed, it will support the execution and sale. This is contradicted by the authorities just cited, and also by the case of *Denning v. Corwin*, 11 Wendell's Rep. 648-9, etc. In that case the Supreme Court of New York says that the court must have jurisdiction of the person and subject matter, or the proceedings will be void—this case was for partition of land; the judgment was held void because it did not appear that the requirements of the law were strictly pursued. The judgment was not erroneous, but void.

From the authorities here cited, and from numerous others, it appears that the circuit court, when executing the law of February 26th, 1839, concerning the revenue, acts as a court of limited and special jurisdiction, and therefore, bound to show that everything was done, and how done, that is required by law to be done, to give jurisdiction. That the Legislature did not deem the circuit court, when executing the revenue laws, a court of common law, is manifested by the fact that it furnished to the court the forms for the judgment and final process, and further, denied to it the power to try the cases according to the course of the common law, but to "*hear and determine* them in a summary manner without pleading." And yet it is said, that a court so trammelled and supplied with manufactured forms is a court of common law jurisdiction, and entitled to all presumption belonging to such courts. This is truly preposterous. For the reason that no *demand* was made by the collector for the taxes upon the owner, and no reason given for its omission, the judgment of the circuit court and other subsequent proceedings are void. Therefore, the law is with the demurrant.

It does not appear that this point was presented to or considered by the Supreme Court of Illinois, either in the case of *Atkins v. Hinman*, or the *People v. Taylor*, reported in 2 Gillman. Hence my opinion is not in conflict with those *decisions*.

Again, there is another fatal defect in the defense. By the collector's report it appears that the land in controversy was valued by the assessor at \$960 00; the judgment is for \$4 44; the State tax amounts only to \$1 92; I suppose the residue was for county purposes. But it no where appears that the county commissioners' court levied a tax at all; the power given to that court was discretionary, to levy a tax not *exceeding* fifty cents in the hundred dollars, or any less sum, or none at all.

This point, also, does not seem to have been considered or decided by the Supreme Court of Illinois.

CIRCUIT COURT OF THE UNITED STATES

MICHIGAN—JUNE TERM, 1847.

THOMAS C. DOHEMAS AND JOHN M. NIXON v. HENRY D.
BENNET, ET AL.

This action was brought to recover the amount due on a promissory note, made by Bennet & Ford, who were partners in trade, to the plaintiffs, citizens of New York.

The declaration alleges one of the defendants to be a citizen of the State of Michigan, and the other to be a citizen of the State of New York.

The defendant Bennet, who is averred to be a citizen of Michigan, and who is served with process, pleads to the jurisdiction of the court, setting forth, that the plaintiffs and defendant Ford, are citizens of the same State.

Mr. *Wilson* for plaintiffs.

Mr. *Hawkins* for defendants.

OPINION OF JUDGE WILKINS.

The plaintiffs demur to the plea, and defendants join in demurrer.

Is the plea to the jurisdiction well taken?

The question is one of jurisdiction, involving a construction of the 11th section of the Judiciary act, and the 1st section of the act of the 28th of February, 1839.

In the case of the *Louisville Rail Road Company v. Letson*, the Supreme Court have no hesitation in saying, "that this last act was passed exclusively with an intent to rid the courts of the decision in the case of *Strawbridge* and

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Curtis," 3 Cranch, 267, which affirmed, "that where there are two or more joint plaintiffs, and two or more joint defendants, in the courts of the United States, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States, in order to support the jurisdiction."

The act of February, 1839, in the opinion of the Supreme Court, enlarges the jurisdiction of the courts of the United States. Its first section provides, "that where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom, shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit, between the parties who may be properly before it: but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer."

This provision was intended to remove the difficulties which occurred in practice, under the 11th section of the judiciary act, and embraces every suit at law or in equity, in which there shall be several defendants, "any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or, who shall not voluntarily appear thereto."

The exception in the act, exempting parties defendant, who have not been regularly served with process, or who have not voluntarily appeared, protects them from being prejudiced by any judgment or decree rendered in such suits against joint defendants.

The defendant Bennet is an inhabitant of the State of Michigan. Process has been served upon him. No process has been served upon Ford, the co-defendant, nor has he voluntarily appeared to the suit. Bennet is properly before

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the court. The rendition of a judgment against him can not conclude or prejudice Ford. It is therefore lawful for the court to entertain jurisdiction of the case as to Bennet.

In the case of the Louisville Rail Road Company, the Supreme Court declare, "that the cases of *Strawbridge* and *Curtis*, and the *Bank v. Devaux*, were carried too far, and not maintainable, upon the true principles of interpretation of the constitution and laws of the United States, and that the case of the *Bank of Vicksburgh v. Slocumb*, was decided upon the authority of those cases.

In the case of *Morrison v. Bennet and another*, 1 McLean's Reports, 330, a case which occurred in Ohio Circuit, in 1838, prior to the act of February, 1839, Mr. Justice McLean held, under the statute of the State of Ohio, regulating the practice of that State, and authorizing the plaintiff to proceed to judgment against the defendant, on whom process had been served—that the court had jurisdiction as between the plaintiff and the defendant, on whom the process had been served.

In the case of *Emerson v. Genney*, this court decided, on a demurrer to the declaration, in an action against joint defendants, one of whom was an inhabitant of this State, and on whom process was served, and the other a citizen of the same State with the plaintiffs, not served, and not appearing,—that the court would entertain jurisdiction.

The demurrer sustained.

WM. B. WELLES v. OLIVER NEWBERRY.

Mr. *Romeyn* for plaintiff.

Mr. *Bates* for defendant.

OPINION OF THE COURT BY JUDGE WILKINS.

THIS cause was tried at the last term, and verdict rendered

for the defendant. The action was brought against him as one of the indorsers of a certain promissory note, made by one George L. Whitney, at Detroit, January 21, 1839, for the sum of three thousand five hundred dollars, payable ninety days after date. The principal witness for the plaintiff, was Mr. John A. Welles, who proved the making of the note, the hand-writing of the defendant as indorser, its negotiation and discount at the F. and M. Bank of Michigan, at the time of its date, of which banking institution the witness was then the cashier, the protest of the note at maturity for non-payment, and the regular notice to the indorsers.

On cross-examination, Mr. Welles further testified, in substance, as follows:

“The Farmers’ and Mechanics’ Bank continued the owners of the note, until the 10th of March, 1845, when it was assigned by deed under seal, with other notes and assets of the bank to the plaintiff, as collateral security for a loan of money, made to the bank by him, and other stockholders, one of whom was a citizen of this State. The nominal consideration in the deed of assignment, was one thousand two hundred dollars. Under its provisions the proceeds, as collected, were to be applied by the plaintiff, as assignee, in payment of the loan to the bank; after the liquidation of which, by the means thus provided, or otherwise, this note, with others, if uncollected, was to revert to the bank. The note never was out of the possession of the bank—was never actually delivered to the plaintiff—and was transferred expressly with the view of bringing this suit in the court of the United States. The plaintiff was not here at the time of the execution of the assignment, and never had been here before. His first visit to this place, was in the summer of 1845, subsequent to the assignment; and neither he nor any other person ever paid any thing for the note. He was not aware that the plaintiff knew any thing about the transaction at

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the time, or that this particular note had been assigned to him. The bank had a general arrangement with certain of the stockholders, who had made pecuniary advances for its relief, to transfer to them as collateral security certain notes, but the original object in the assignment of this note to the plaintiff without his knowledge, was to enable suit to be brought in the circuit court of the United States, and thereby avoid the decision of the State courts, in relation to proof of notice. Subsequently, in the month of June, the plaintiff ratified the assignment, and accepted this note as collateral security for his advances, but the note itself never was delivered to him, and never passed out of the actual custody of the bank, until delivered by the witness to Mr. Abbot, the attorney of the bank, to bring this suit. The arrangement with the other indorser, was made and completed anterior to the assignment to the plaintiff."

The note was delivered to the attorney without explanation, as the note of the plaintiff, and at the time, the bank was indebted to him beyond the amount of the note.

Such is the substance of the testimony of Mr. Welles, the witness of the plaintiff, and for a long time the cashier of the Farmers' and Mechanics' Bank of Michigan, a banking institution chartered by this State, and located and doing business in the city of Detroit.

On the question presented by this testimony, the court, among other matters, instructed the jury that,

"If they believed that the note was transferred only as collateral security, to secure a prior debt of the bank to the plaintiff, to be accounted for and restored to the bank, in case such debt was otherwise discharged, and for the purpose of suing in the United States court, the note still remaining the property, and in possession of the bank, then such assignment did not absolutely vest the ownership of the note in the plaintiff."

The new trial is asked, on the ground of the insufficiency of the testimony, and error in the charge of the court; but argued mainly on the last point.

It is clear that the bank was the real holder of the note, from the period of its negotiation, down to the institution of the suit in this court. The assignment of the plaintiff, under the circumstances, with the sole object of bringing the suit in this court, did not divest the bank of its property, or make the plaintiff the real holder. He was merely the agent of the bank, with authority to collect, and bound to account for the proceeds; and if uncollected, to restore the note to the principal. In fact, the suit was instituted and prosecuted for the sole benefit of, and under the direction of the bank, in the name of the plaintiff.

It is true, the possession of a negotiable note is *prima facie* evidence of the party's being a holder for a valuable consideration, and he is not bound to prove by other evidence, that he is a *bona fide* holder. But, if it is proved *aliunde*, that he is but a mere agent, to give jurisdiction to this court, and holds and prosecutes the note as such, and with such object, he can not recover a judgment upon it here in his own name. Such was the decision of Mr. Justice Story, in 5 Mason, 58, and who cited 10 John. R. 387, and 5 Mass. 491.

The point made in 5 Mason, was, that the plaintiff was *not the owner of the notes*, upon which the action was brought, but that they belonged to the Merchants' Bank at Newport, by which they had been originally discounted, and that they had been delivered to the plaintiff for the purpose of enabling suit to be brought upon them in the circuit court of the United States.

The evidence here was much stronger against the plaintiff's recovery, for this note was never actually delivered to him, nor was he privy to the deed of assignment at the time of its execution, his name being used without his assent at the time, and the assignment was made to him as a citizen of a foreign

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jurisdiction, having an interest in the bank, for the sole purpose of enabling the bank to bring suit in this court.

Apart from his interest in the bank as a stockholder, the plaintiff had no substantial interest in the note. The jury found the facts that the plaintiff was to account to the bank for the note as agent, and to restore it, if not collected, and that the note still remained the property of the bank, and that the action was prosecuted for the benefit of the bank. Such being the case, he could not maintain an action as the indorsee of the note against the defendant in this court.

But, the plaintiff's title to the note, if any he had, was not derived from the contract of indorsement. He did not receive it as negotiable paper, in the course of trade. The note was past due at the time of the transfer, many years previous to the assignment, the note had matured, and had been protested for non-payment. His title, therefore, was conferred by the deed of assignment, which circumstance alone, was sufficient to defeat his action in this court.

Motion for a new trial refused.

ARTHUR H. ROOT v. BROTHERSON AND BROTHERSON.

A deed executed in any other State, for lands in Michigan, is valid.

This validity is imparted by the statute of Michigan.

Each State has a right to regulate the transmission of real property, by deed, or by operation of law.

To a deed executed in New York for land in Michigan, it is objected, that it does not appear, the parties making the deed resided in New York.

The statute refers to the place where the deed was executed, and not to the residence of the persons who made it.

It is admitted the deed was made in pursuance of the laws of New York.

This is sufficient.

Messrs. *Walker and Campbell* for complainant.

Messrs. *Abbott, Townsend and Hawkins* for defendant.

OPINION OF THE COURT.

THE complainant filed a bill to foreclose a mortgage, purporting to be executed by the defendant, Brotherson and wife, in the State of New York.

Brotherson filed an answer and his wife demurred to the bill. As cause of demurrer, among other things it is assigned, that it does not appear in and by the said bill of complaint that said Cynthia R. Brotherson executed the said mortgage in accordance with the laws of this State, or of the State of New York, so as to make the same a valid conveyance in this State.

It is said, if the mortgage was executed in this State, the certificate of acknowledgment is deficient, and consequently no bar to dower, in the premises described. But the mortgage was executed in New York.

The 4th sec. of the act of 1840 provides that "when any married woman, residing in this State, shall join with her husband in a deed of conveyance of real estate, situate within this State, the acknowledgment of the wife shall be taken separately and apart from her husband's, and she shall acknowledge that she executed such deed freely, and without any fear or compulsion from any one." Now, it is admitted that these words must be certified, by the officer taking the acknowledgment, to divest the *feme covert* of her dower.

But the same law provides, that a deed for land in Michigan may be executed according to the laws of any other State or territory, and certified by the clerk or other proper certifying officer of a court of record of the county within which such acknowledgment was taken, under the seal of his office, etc. And also that "when any married woman, not residing within this State, shall join with her husband in any conveyance of real estate, situated within this State, the conveyance shall have the same effect as if she were sole, and

the acknowledgment or proof of the execution of such conveyance by her, may be the same as if she were sole."

Now, the objection is, not that the mortgage was not executed in New York, but that the persons executing it were not, at the time, residing in New York. The acknowledgment was taken before Leonard "Burnet, a justice of the peace in and for the county of Niagara, and State of New York." There is no exception taken that the acknowledgment does not conform to the laws of New York, or that it is not duly certified, as required by the laws of Michigan.

The principle is not doubted, that real estate must be conveyed in conformity to the law of the State in which it is situated. And this conveyance, though made as required by the laws of New York, derives its validity entirely from the Michigan statute, which recognizes it as valid.

The bill represents that the mortgage was executed in New York, in pursuance of the laws of that State. This being done, the court will not presume against the official act of the acknowledgment. There could be no motives, for persons residing in Michigan, to go to New York for the purpose of conveying lands in Michigan. Besides, the Michigan statute does not require as a condition to such conveyance, that the grantors should reside in such State. Had there been such a provision, there would have been more force in the objection, that it does not appear from the bill, the mortgagors resided in New York when the mortgage was executed.

When the deed is executed in Michigan, it must be conformably to the Michigan statute. And this applies to all deeds executed in the State, for lands within it, whether by residents or persons merely passing through the State. The same principle, it is supposed, applies, under the Michigan statute, to deeds executed in any other State.

The demurrer is overruled, etc.

EARL v. RAYMOND & RAYMOND.

The pendency of a suit in the State court, may be pleaded in abatement, to a suit subsequently brought by the same parties, and for the same cause, in the Circuit Court of the United States.

In this respect, the State courts are considered as exercising a jurisdiction, being first assumed, which must abate the suit in the courts of the Union.

No other course can prevent a conflict of jurisdiction.

So when a sheriff first levies on personal property, under a State judgment, there is a prior lien, over a levy made on the same property by the marshal.

One of joint promissors filed the plea in abatement, the other suffered a default.

A motion being made for judgment on the default, the court refused the motion, on the ground that the plea showed there could be no procedure against him.

Mr. Clark for plaintiff.

Mr. Douglass for defendant.

OPINION OF THE COURT.

THIS is an action of assumpsit against the defendants, as partners, and makers of a promissory note for \$1067 48. There are two counts in the declaration, one upon a note, the other upon an account stated.

One of the defendants, Samuel A. Raymond, pleads in abatement, "that before the filing and service of the said declaration upon him, to wit, in the term of October, in the year one thousand eight hundred and forty six, to wit, on the eighth day of January, 1847, in the circuit court for the county of Berrien, in the State of Michigan, the said plaintiff impleaded the said defendants, Samuel and William A. Raymond, and exhibited his declaration against them in a certain plea of trespass on the case upon the very same identical promises and undertaking as in the declaration in the present suit, etc., and said suit is still pending, etc., in said court. To this plea the plaintiff demurs.

The courts of the United States have uniformly held, under the constitution and acts of Congress, the judgments of the

State courts as domestic judgments, and consequently, as purporting upon their face absolute verity. In this respect the same effect is given to them, or should be given to them, in every other State as in the one where the judgment was rendered. It is true, an execution can not be issued on the judgment of a sister State, but in every other respect the effect is the same.

When a court is called to act on a judgment in the State where it was originally entered, or in any other State, it will see if the court had jurisdiction of the matter, and also, whether due notice was given to the party against whom judgment was rendered.

Different views were entertained by some of the State courts, and especially by those of New York, but for some years past, the decisions of the Supreme Court of the United States, in this respect, have been generally followed by the State courts.

That the pendency of a former suit, in a court having jurisdiction of the same, may be pleaded in abatement, is a principle well established. It is so held, to prevent a multiplicity of suits being brought for the same cause. To tolerate the pendency of several suits, at the same time, for the same cause, would be a reproach to the administration of justice. Courts of justice were instituted to afford speedy and effectual remedies for the redress of wrongs, and not to afford a litigious person the means of oppression.

The recovery of a judgment for the same cause of action in the State court, closes the controversy, and merges in the judgment the cause of action. And in this respect, the same doctrine is held in the courts of the United States, in regard to the judgment of a State court, as a judgment given by a court of the United States. The courts of the United States are not foreign to the States. They administer the laws of the State, following the established construction of its statutes by its own courts. And, if this effect be given to the judg-

ment of a State court, it would follow, that the pendency of a suit, in such court, may be pleaded in an action for the same cause, in the courts of the United States. There is no other mode by which a conflict of jurisdiction can be avoided.

It may be laid down as a general rule of action for the Federal and State courts, that which ever shall first take jurisdiction of a case, the jurisdiction of the other may be defeated by a plea in abatement. And to avoid a conflict between the ministerial officers of the Federal and State courts, the officer who first levies his execution, is entitled to a preference, the same as where both executions emanate from a State court or courts.

This court takes cognizance of the laws of the State, and they know that the Circuit Court of Berrien county is a court of general jurisdiction. The decision of the Supreme Court has removed the objection that the adoption of the revised statutes abrogated the circuit courts of the State.

The demurrer to the plea is sustained.

THIS decision being announced, a motion was made for judgment against the other defendant, who had suffered a default.

If one of two joint promisers plead infancy or bankruptcy, the action may be prosecuted against the other. But, if the plea of one be to the merits, and the plea is sustained, the other is discharged, because the plea shows that neither can be charged. If the note was given without consideration, or for a consideration forbidden by law, or against the policy of the law, the plea of one would discharge both.

In this case the plea filed showed equally a want of jurisdiction, as to both parties. The default confesses the jurisdiction, but the plea shows there can be no jurisdiction; the same as a plea to the merits, that there can be no recovery. 2 Serg't. & R. 280; 1 Chitt. pl. 44, a; Bingham

on Jndg't. 13 L. Library, 95 Margin; 10 John. Rep. 578;
2 McLean's Rep. 168.

The motion for judgment is overruled.

UNITED STATES v. B. O. WILLIAMS.

A judgment against one of the partners of a firm, will authorize the sheriff or marshal to levy on the right of the judgment debtor in the goods.

But the debts of the partnership must be first paid, before the partnership property can be applied in payment of the individual debts of either partner.

If the officer shall deem it safe, he may make an arrangement with the partner to sell the goods, and account for the proceeds, after paying the debts of the partnership.

And where it is necessary for the security of the officer, he may take possession of the entire property, and sell the interest of the partner against whom judgment has been entered.

But this proceeding ought not to be had, as it breaks up the partnership, and leads to great uncertainty, unless it be necessary.

The purchaser of the right sold becomes a substituted partner, in lieu of him him whose property is sold.

Mr. *Norvell*, District Attorney.

Messrs. *Fraser, Howard, Gould, and Romeyn* for the defendant.

OPINION OF THE COURT.

THIS is an indictment for resisting process. By the 22d section of the act of April 30th, 1790, it is provided, if any person shall knowingly obstruct, resist, or oppose, any officer of the United States, in serving any legal or judicial writ on process whatsoever, or shall assault, beat or wound any officer or other person duly authorized, in serving or executing any writ, he shall be imprisoned, etc.

A judgment having been obtained in this court by *Sheldon and others v. Castle and McGilvers*, an execution was issued,

which was levied on the goods of a store owned by McGilvers and Williams, the defendant in partnership. Thompson was deputy marshal. The execution being offered in evidence to the jury, was objected to, on the ground that it was not sufficiently described in the indictment. The names of the parties are stated, and the judgment, which, the court think, sufficiently describe the execution; and it was read in evidence. And the deputy marshal states that he levied it on the goods of the store. He proposed to set off McGilvers's interest; but the defendant said he could not permit the goods to be taken. After taking advice, witness returned to the store, and informed the partners, as they refused to give up McGilvers's interest, it was his duty to take possession of the whole of the goods. The defendant then made two propositions. 1st—That the marshal might advertise and sell McGilvers's interest, subject to all the debts of the concern. 2d. Place a clerk in the store, and see that an account was kept; and finally, the levy to be held subject to the debts of the partnership, and whatever remained of McGilvers's interest could be sold.

Being about to leave the store, witness asked Williams if he refused to permit him to take possession of the whole or any part of the goods. And he answered that he did refuse, on which the witness left the store. Afterward, on the 30th of January, witness took six individuals, and entered the store. Defendant said he would not permit the goods to be touched, and if witness made the attempt to take them, he would put him out of the store. Witness replied that he was deputy marshal, referred to the process, and commanded all present to assist him if resisted. The defendant then said, if any one touched the goods, it should be done at his peril. Johnson counted shovels, etc., and Williams pulled his hands off. Other persons, in attempting to remove the goods, were resisted by Williams, the defendant. A general scuffle ensued; defendant took hold of witness, ordered the door to be

opened, and requested him to leave the place. Witness did not attempt to remove the goods out of doors, but claimed the right to remove them, should he not consider them safe.

Williams was willing that witness should sell the right of McGilvers in the goods; but that debts were due by the firm, and McGilvers owed the firm, the amount of which he could not immediately ascertain. Witness claimed the right to take exclusive possession of the goods, and sell McGilvers's interest, unless that interest should be set off.

Under a *fiery facias* against one of two partners, the sheriff or marshal may seize the goods of both, and sell the defendant's moiety in them; in which case the vendee will be tenant in common with the other partner. 2 Doug. 650; Comyns, 217; 1 Salk. 392; 3 B. and P. 254, 288; 24 Wind. 393, 4-398; 3 Wash. 6 C. C. Rep. 327, 338.

Unless the officer levying the execution can make an arrangement satisfactory and safe to himself, in regard to the partnership goods, he has a right to take the whole of them into his possession, until the sale of the interest of the partner levied on. But this need not be done where there is no necessity for it.

The partnership debts must be paid, before the interest of either partner can be applied in satisfaction of any individual debt. And the extent of this interest, where debts are owing by the firm, must be more or less uncertain. Even the most accurate statements, made out from the books of the partnership, can be nothing more than an approximation to the true amount. Debts are to be collected, and goods are to be sold. From these sources, far less than the nominal value may be realized.

To take possession of the entire goods, must seriously affect the credit of the firm of the partner, who is answerable for all the partnership debts. It is desirable, therefore, that in such cases the officer should make a reasonable arrangement with the partner, so as to have the goods safely kept until the

day of sale. The purchaser will enter as a partner in the firm, in the place of the judgment debtor.

It is proper that I should remark to you, gentlemen of the jury, that the defendant showed no disposition to prevent the sale of McGilvers's interest in the partnership. He seemed to be only desirous of protecting his own interest, and the interest of the creditors of the firm, and the propositions he made were fair, if the officer could trust him with the goods. The clerk which it was proposed to put into the store, would seem to afford security against the illegal acts of the active partner.

Upon the whole, gentlemen, it will be for you to determine whether the defendant is guilty of resisting the process of the court, as he stands charged in the indictment. Where an individual arrays himself against the authority of the officer, he incurs a serious responsibility, and if convicted, must suffer the penalty, provided. You will consider the mitigating circumstances of this case, as shown by the testimony, and find the defendant guilty or not guilty, as your judgments shall dictate.

The jury found the defendant not guilty.

E. HURD v. WILLIAMS AND HUNT.

A motion made at one term but not decided at that term, nor continued to the next one, the court will order a continuance *nunc pro tunc*, but will not require the other party to take up the motion at the term.

He had a right to suppose, that as the motion was not continued, it had been abandoned.

Mr. *Emmons* for plaintiff.

Mr. *Davidson* for defendants.

OPINION OF THE COURT.

A motion was made at the last term in this case, to se

H. Shankwiler v. A. Reading.

aside a sale on execution. The motion was not continued, and the defendants' counsel objects to taking it up, on that ground. The court directed a continuance to be entered *nunc pro tunc*, but held that the defendants' counsel was not bound to take up the cause at the present term, as the motion was not continued regularly from the last term. The defendants' counsel had a right to suppose, as the motion was not continued, it had been abandoned.

H. SHANKWILER v. A. READING.

The law requires the deposition taken under the act of Congress, to be retained by the officer, until he deliver the same into court, or shall, together with a certificate of the reasons for taking it, etc., be by him sealed and directed to the court.

The law did not intend that either party should have possession of the deposition, until it shall be published by the special or general order of the court.

A deposition not so put up and directed, will be rejected.

Messrs. *Bates* and *Watson* for plaintiff.

Mr. *Romeyn* for defendant.

OPINION OF THE COURT.

On the trial of this case, a deposition was offered in evidence, which was taken in New York, May 29th, 1847. It was mailed at Waterloo, in that State, June the 4th, and received from the post office here, the 7th of June. The county judge certified that the deposition was reduced to writing by the deponent, in his presence, but did not state that it was retained by him until it was sealed and directed to the clerk of the circuit court. It was so directed, but by whom is not stated. The name of the case in which the deposition was taken was indorsed on the envelope. For the want of this certificate, the deposition was objected to.

The act of Congress provides that the depositions so taken

shall be retained by such magistrate, until he deliver the same with his own hand, into the court, for which they were taken, or shall, together with a certificate of the reasons as aforesaid, of their being taken, and of the notice, if any, given to the adverse party, be by him, the said Magistrate, sealed up and directed to such court, and remain under his seal, until opened in court.

This act of Congress, under which depositions are generally taken, without notice, has always received a strict construction. In *Beal v. Thompson et al*, 8 Cranch, 70, it was held to be a fatal objection to a deposition taken under the judiciary act of 1789, that it was opened out of court. And in the case of the *United States v. Smith*, 4 Day, 121, it was decided where the certificate of a magistrate, taking a deposition, stated it to have been written in his presence, without saying by whom, and it appeared that the substance of it had been reduced to writing by the deponent, ten days before, at a different place, when the magistrate was not present, that such deposition was not admissible in evidence.

The deposition objected to, may have been handed to the party, at whose instance it was taken, who forwarded it by mail to the clerk of the court. The law did not intend that either party should have possession of the deposition, until it should be received by the clerk, and opened by the general or special order of the court. The deposition is rejected.

WEST, OLIVER & Co. v. DAVIS.

Where no fraud or unfairness is alleged, a court will not set aside a judicial sale, on the ground of inadequacy of price.

Mr. Davidson appears for complainants.

Mr. Romeyn for defendant.

OPINION OF THE COURT.

THIS is a petition representing that a decree of foreclosure entered on a certain mortgage, on a bill filed, being taken *pro confesso*, the mortgaged premises were ordered to be sold, and after notice given as required, they were sold for one hundred dollars; when the property is represented to be worth six hundred dollars. That it rents for seventy-five dollars per annum. The sale was confirmed by the court. Petitioner prays that the sale may be set aside on the ground of inadequacy of price, and some other circumstances alleged. No fraud or unfairness is suggested.

This application is opposed, first, on the ground that it asks the court to annul and set aside an order or decree entered at a previous term, which the court can not do. That this principle is fully recognized in 3 Wheat. Rep. 591; 12 Peters' 490-2; 10 Ib. 480; and that the same point was settled in *Medford v. Dorsey*, 2 Wash. O. C. 433. It is also urged that the biddings will not be opened and a re-sale ordered except in cases of fraud, accident or mistake, 2 Paige Rep. 100.

This application does not affect the original decree, but, only the confirmation of the sale. This order is made, as a matter of course, where no objection is made, and the proceedings on their face appear to be regular. Such an order, it would seem, can not have attached to it the same dignity as a final decree on the merits. And if at any future time it should appear that the proceedings of the marshal had been irregular, the confirmation, we suppose, might be set aside.

There does not appear to be, in the present case, any irregularity, mistake or fraud. The only objection urged is, that the property sold for less than its value. We can not say that this inadequacy is so striking as to authorize the setting aside of the sale. The application is, therefore, rejected.

JOSEPH ORR v. ELIJAH LACY.

Words of surplusage, not descriptive of the bill, but of the place where it is payable, is no variance.

When notes or bills are sent for collection, they are, generally, indorsed in blank, so as to enable the holder to fill up an assignment to himself.

Under this, he may bring a suit in his own name.

A foreign bill of exchange must be regularly protested, after a demand and refusal of payment.

A seal of a notary may be an impresson made by the seal on paper, without wax or any other tenaceous substance.

The seal of the notary is recognized in all countries where the law merchant prevails.

A seal is not required by the civil law.

Where evidence has been given, as to notice, the court will refer the matter to the jury, stating, as matter of law, what is a sufficient notice.

There is no usury in charging exchange on a bill drawn in Indiana, payable in New York.

A purchase of a bill at any discount or premium, not done to cover usury, is not usurious.

The notes of a western specie paying bank are less valuable, generally, than the notes of eastern banks, and this may be covered by a contract, without usury.

The notes, it is alleged, were signed and indorsed in Michigan, but as they were negotiated at the bank in Indiana, the court held that, that was the place of contract.

Messrs. *Joy and Porter* for plaintiff.

Messrs. *Romeyn and Dana* for defendants.

OPINION OF THE COURT.

THIS action is brought on a bill of exchange, dated the 21st of September, 1840, for \$3842, payable six months after date, by Elijah Lacy, payable to the order of David Lacy, at the City Bank, New York city, which was accepted, but not paid. The jury being sworn, this bill was offered in evidence.

A. Rogers, a notary public was called to prove a demand of payment on the bill, protest for non-payment, and notice to the drawer and indorser. The objections stated on this

point will be noticed at a subsequent stage of the proceeding; it being agreed that all exceptions may be taken at that time.

An objection is made to the admission of this bill, that it is not accurately described in the declaration. The declaration states the bill to be "payable, at the City Bank, New York city, in the State of New York." The only variance is, that the bill on its face was payable at the City Bank, New York city. And the declaration, after so describing the bill, adds "in the State of New York." Now, this is an additional fact stated, not as descriptive of the bill, but after stating that it was "payable at the City Bank, in New York city," "in the State of New York," is added. That is, the City Bank and the city of New York are in the State of New York. The declaration would have been good without this, as "New York city" is as well known as "the State of New York," but it is given as describing the state in which New York city is situated, and not as descriptive of the bill. There is no variance between the declaration and the bill which can exclude it from being received as evidence.

As by arrangement the questions of law were to be raised in the form of instructions to the jury, the instructions asked will be considered.

1. That it is not competent for a mere agent to maintain an action on a negotiable note, or bill of exchange, in his hands, though it be with the consent of his principal. And if the jury believe that the bill of exchange in controversy belonged, at the time of the institution of this suit, to the State Bank of Indiana, and that the plaintiff sues merely as its agent, then he is not entitled to recover.

In answer to this, the fact may be admitted, that Orr sues as the agent of the bank. This is an ordinary transaction, not only with banks, but with all holders of bills, when it becomes necessary to send them to banks or other agents for collection. They are indorsed in blank, and this gives authority to the agent, not only to receive and receipt for the

money, but to bring a suit in his own name, on the bill. There was a blank indorsement on the bill before us, and that is now filled up in the name of Orr, the plaintiff. This is, at least, *prima facie* evidence of a legal right to sue, and it is not controverted by evidence. This question can only become important, as regards the jurisdiction of the court, or set-off. The suit is prosecuted with the assent of the bank, and, in fact, by it, in the name of the plaintiff.

2. That the defendant in this case, by drawing the bill of exchange in dispute did not assume an absolute, but a conditional liability, that after it was accepted, his liability and obligation were not to pay it at maturity if the acceptor did not pay it, but only to pay in case the bill should be legally presented for payment, and then in the event of a refusal or neglect to pay by the acceptor, that it should be regularly protested, and due notice given to him of the dishonor. That presentment for payment at maturity, and, at the proper place, demand of payment, refusal or neglect to pay, legal protest and due notice of these facts to the drawer, must all concur, before he can be held liable.

This instruction was given as asked.

3. "That this being a foreign bill of exchange, in order to charge the drawer, it is necessary that it should have been regularly protested by a notary public."

And it is contended that there is no evidence of Mr. Rogers having been a notary public. He swears that he was one on the 25th of March, 1841, but this bill was dishonored on the 24th.

The court answer this by saying, that the principle in the instruction is correct; and they also say that the notarial seal is evidence of the character and authority of the notary.

4. "That in order to charge this defendant a regular protest must be produced, and that the paper attached to the bill of exchange in this case is not a sufficient and regular protest, not being under the seal of the notary."

In support of this, it is argued, "that a seal is required by the law merchant. Story on Bills of Exchange, 277; Chitty, 455. The seal must be on wax at common law. 4 Kent, 453. In this State, it is conceded that it may be a scroll or device, but not by an impression on paper. Laws of 1840, pp. 167, sec. 8. In New York, by statute, public officers and courts may seal by an impression upon paper. 2 Rev. Stat., 404, sec. 61; 4 Kent, 453. The question then is, Will such an impression by a notary be recognized as a good sealing of the protest under the present law."

"But admit that a proper impression made in New York, may be a good one, a distinct and an important question arises, where is the evidence that this is the seal of the notary, or that Rogers was in fact a notary? To test this we ask the court to charge as follows:

'That there is no evidence before the jury that the paper attached to the bill of exchange, read in this case, is the protest of the bill of exchange by a notary.'

And it is argued that, although a paper impression may be good in New York, still it does not follow that it proves itself in another State, for the law of evidence *lex fori*. 2 Hill, 227; Story on Conflict of Laws, 634."

The court refuse the fourth and fifth instructions. The sufficiency of the notice, when the facts are not disputed, is a question of law. Story on Bills of Exchange, 390. The notary swears that he made a demand for payment at the bank, at the maturity of the bill—that he regularly protested it for non-payment, and gave notice on the 25th of March, 1841. A seal is not required by the civil law, but it has been required by the common law from its earliest history. In the 2 Revised Statutes N. Y. 75—"Seals of courts and officers are authorized to be made by a direct impression on paper." Judge Cowen says, "that the seal under this statute has no force beyond our own territory." If this be correct, it can

be correct only in a very limited sense. In New York the common law form is adhered to, the impression must be made on wax, or some tenaceous substance; and under this rule the courts may not consider a scroll as a seal on private writings, but in regard to judicial records and public documents, the seal would be recognized as valid, if applied as required by the law of the State where it is used.

The notorial seal proves itself in all countries where the law merchant prevails, and it is only necessary that it should conform to the law of the place where the notary acts. An impression upon the paper is as good as upon wax, or any tenaceous substance. An impression on the parchment or paper, with an intent to make a seal, is good at common law. Chancellor Kent says, 4 Comm. 852 n. a.—“In public and notorial instruments, the seal or impression is usually made on the paper, and with such force as to give tenacity to the impression, and to leave the character of the seal upon it.”

A notary is a commercial officer. His seal is an authentication of his acts, more generally acknowledged throughout the commercial world than that of any other officer. And this is sanctioned under the law merchant, which is a part of the common law, and is essential to commercial transactions.

6. That even if the bill had been regularly presented and protested, and the evidence of the protest is sufficient, the plaintiff is not entitled to recover, unless the jury believe that the defendant was duly and legally notified of the dishonor of the paper.

The court will give this instruction, with the remark, that the notary having made the demand, and protest was required in regard to the notice to deposit it in the New York post-office, directed to the residence of the party notified.

7. That there is no legal and sufficient evidence of such notice.

The court refuse this instruction, and say to the jury, if they believe the facts sworn to by the notary, there was legal notice.

8. That in order to charge the defendant, it is necessary that they should believe from the evidence that the notice sent to the drawer, by express terms, or by natural or necessary implication from the language used, contained in substance a true description of the bill, an assertion of due presentment and dishonor, and that the holder or some other person, looked to the drawer for indemnity and reimbursement.

In answer to this, the court will say, that the notice must have been sufficient to apprise the drawer of the bill in question, that it was not paid, though demand for payment was made, and that the holder will look to him for payment.

9. That the State Bank of Indiana, by its charter, had no right on a loan of money, or discount of a note or bill, to take more than six per cent. per annum, and that if there was on the discount of either of the original bills of exchange an illegal interest, and a corrupt agreement on the part of the bank, to take more than the legal rate of interest, and such was actually taken or contracted for, and the amount thereof included in the present bill, and that it was given for the same, then the latter can not be collected from this defendant.

1. Under this head it is argued, that a willful violation of the charter of the bank, renders the contract void, irrespective of the general usury laws. 2 Peters, 527; 9 Peters, 400, and many other cases settle this point.

2. That if the original transaction was illegal and usurious, the renewed security is so. *Walker v. Bank of Washington*, 3 Howard, 71; 13 Peters, 345.

3. The instruction as prayed for, does not make the mere loaning of depreciated bills *per se*, an act of usury, or violation of the charter, but leaves it as a question of fact for the jury, and is, therefore, directly within the case of the *Bank of the United States v. Waggoner*, 9 Peters, 400.

We contend to the jury, that there are strong circumstances to show the usury in this case. That it consisted in paying

out depreciated bank notes, and in requiring the paper to be payable in New York.

In answer, the court give the ninth instruction. And they remarked to the jury, the usury set up having been pleaded, may be insisted on by the defendant. The consideration of the bill now before us, it is considered, was usurious. That consideration consisted in two previous bills. One was a draft on Elijah Lacy, drawn by O. P. Lacy, for three thousand dollars, on the order of William B. Beason, five months after date, and which was dated 1st February, 1840. The other bill by the same parties, was dated the 14th of April, 1840, for two hundred dollars, payable in ninety days. These bills having been protested for non-payment, were returned to the bank. At the time they were negotiated at the bank, it paid specie, and continued to do so until July, 1840.

The interest was charged upon the above bills, and five per cent. damages allowed in such cases by the Michigan statute. A payment of fifteen hundred dollars was made on the bills, and the bill of exchange now in controversy was given for the balance still due.

The charter of the bank prohibits it from taking more than six per cent. interest. Now, to constitute usury, there must be a loan made, corruptly, for more than the legal rate of interest, and with the intention of evading the law. If depreciated notes are loaned as money, it may be a circumstance connected with others, to show a corrupt intent. But the Bank of Indiana paid specie at the time, and its notes, though less valuable than eastern paper, can not be considered as depreciated paper, so long as an application at the bank would convert them into specie.

It is said that at the time the first bills were given, a bill on New York was worth from seven to ten per cent. more than the paper of the bank. This refers to bills payable at sight; there has been no evidence as to the value of bills on New York payable on time. One of the original bills was

payable in five months, the other in three. From the course of trade, exchange is generally in favor of the east and against the west.

In buying such bills, banks generally incur some risk. The exchange varies, and the payment may not be made punctually. The present case illustrates this fact. Such a transaction being *bona fide*, is never usurious. Banks deal in bills of exchange, a purchase of a bill, at any price, is not usurious. But if such purchase is made as a cover to the transaction, it may be usurious. The usual course is, to draw eastern bills and ship produce to meet them. Such a transaction is not usurious. In the language of the Supreme Court, in 9 Peters, 399, "there must be an intention, knowingly, to contract for, or to take usurious interest, for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement."

In the same case, the court says, "if the contract was fairly made by the parties, making the contract intended, to exchange credits for the accommodation of Owens; that the Bank of Kentucky was solvent, and able to pay its debts by coercion, then the contract was not void for usury, nor contrary to the charter of the bank, notwithstanding the party knew that the Bank of Kentucky did not pay specie for its notes without coercion, and that those notes were in exchange at a depreciation of from thirty-three to forty per cent. below par."

10. "That if the original bills of exchange were legal and untainted, yet if on the renewal of them more than legal interest was unlawfully stipulated for and included in the paper taken on renewal, then such paper is void."

This instruction was given by the court—

11. "That if the jury find, that the first bills were drawn, accepted and indorsed in Michigan, and that the parties all resided there at the time and since then, the law of that State fixes the damages chargeable to the drawer, upon their dis-

honor, and if they find that in the renewal of the paper the agent of the holder, with the assent of his principal, intentionally exacted more than three per cent. as damages on the protested paper, and included such amount in the bill taken on renewal, and that the present bill, now in dispute, was intentionally drawn so as to cover damages of more than three per cent., besides expenses, then the defendant is not liable upon it, and the verdict must be for him."

12. That if the renewed paper were in other respects legal, yet, if in addition to the full amount due on the former bills, with damages, expenses and interest, the jury believe that the State Bank required of Obed P. Lacy, and he agreed thereto, as a condition of renewal and extension, that he should make the paper taken on renewal, payable in New York, and that exchange on New York was worth a premium to the bank, and such condition was imposed, with a view to secure to the bank, at the expense of the debtor, more than legal interest, or a profit in addition to the rate of interest fixed by its charter; and that the present bill was made and delivered in pursuance of such agreement, then they are to find for the defendant.

The instructions have been drawn out to an unreasonable length, and have presented the same views under somewhat different modifications. As to the eleventh instruction, it is refused, as also the last one. It is immaterial where the parties resided, the bills were negotiated at the bank in Indiana. Until the bank discounted them they were of no validity, as they were bills for discount, and not for any other purpose. The State where the contract was negotiated, must regulate the damages on protest, and they were rightly calculated under the Indiana law. No additional remarks need be made in regard to exchange.

Under the instructions of the court the jury found a verdict for the plaintiff.

Judgment.

MURPHY v. McVICKER ET AL.

A party who desires to rescind a contract on the ground of fraud, must offer to return the thing purchased, whether it be land or personal property.

The vendor must be placed by the vendee in the condition he was in before the purchase.

The deed being defective, being made under a defective power, the court will decree a conveyance, on the payment of the residue of the purchase money.

Mr. *Backus* for complainant.

Mr. *Seaman* for defendant.

OPINION OF THE COURT.

THIS bill was filed, apparently, with the view of rescinding a contract for the purchase of a tract of land in Eaton county. The consideration agreed to be paid was the sum of four hundred and eighty dollars, and the complainant represents the land is not worth half that amount. That fraudulent representations were made to him by the vendor, as to the locality of the land, and its quality, which induced the complainant to purchase it. But there is no specific prayer for a rescission of the contract, no tender of a reconveyance, and an offer to surrender the possession. It is therefore clear there can be no decree, under the bill, to rescind the contract.

The chief object of the bill would seem to be to procure an effective deed for the land. It was purchased by the complainant, and a deed was executed to him under an insufficient power of attorney. The defects in the power are stated to be, that it has but one witness, and is not under seal. These defects are radical, as they did not authorize the conveyance that seems to have been executed under it. A power of attorney, to authorize the conveyance of land in fee simple, must have all the solemnities and forms required to make effective the instrument to be executed. The statute requires two witnesses; of course, the power must have two witnesses.

And as a deed is inoperative, as such, without a seal, it can not be executed under an authority without seal.

The court, therefore, will decree that a good and effective deed shall be executed by the defendant, of general warranty, and held ready to be delivered on the payment of the balance of the purchase money which remains due.

SPOFFORD v. RITTEN.

A very slight amendment of the declaration, which in no respect can affect the merits of the case, does not require a copy of the declaration to be served under the rule.

The plea filed by the defendant, required the amendment.

There is no irregularity in the judgment, which can authorize the court to set it aside.

Mr. *Emmons* for the plaintiff.

Mr. *Goodwin* for defendant.

OPINION OF THE COURT.

THIS is a motion to set aside a judgment, on the ground that, the suit having been commenced by declaration, which was served on defendant, who pleaded that he was an alien, though alleged in the declaration to be a citizen of Michigan. Leave was given to amend the declaration, alleging that the defendant was an alien. On this amendment being made, a judgment by default was entered. And now a motion was made to set aside the judgment by default, for irregularity. 1 Chitt. Pl. 253, 1 Doug. Mich. 434.

It is contended that a new cause of action can not be introduced by the plaintiff, in his declaration, under leave to amend it, which shall affect the rights of the defendant by avoiding the statute of limitations. But the above amendment was not of that character. It was a mere description of the person, which in no respect affected the rights of either party. He, being an alien, was as liable to the process of

Wood, Grant and Wood v. Luse and Niles.

the court, and the claim of the plaintiff, as if he were a citizen. So that there could be no objection to the amendment, arising out of the lapse of time, or on any other ground. The amendment could not have taken the party by surprise, as it became necessary from the interposition of his plea.

There is no objection that no rule for plea was entered after the declaration was amended. But the objection is, that the counsel for the defendant, being in court, cognizant of the plea of the defendant, the leave to amend, and rule for plea, had not a copy of the amended declaration served upon him. The rule in terms requires this to be done in general language; but the court must see that a rule designed to protect the rights of the defendant, shall not be made to operate unjustly against the plaintiff. There could be no necessity for a copy of the declaration to be served on the counsel in this case. The amendment was slight, and not at all affecting any defense which the defendant could set up on the merits.

The motion is overruled.

WOOD, GRANT & WOOD v. LUSE & NILES.

A judgment can not be set aside on motion, after the term in which it was rendered.

In New York it is otherwise.

But the Supreme court follow the common law doctrine on this subject.

Mr. *Davidson* for plaintiffs.

Messrs. *Joy* and *Porter* for defendant.

OPINION OF THE COURT.

THIS is a motion by defendants to set aside certain proceedings, as well in the above cause as in another, in both of which judgments had been obtained more than six years ago. An affidavit is filed as the foundation of the motion.

If the motion was not objectionable on other ground, it is clear that the proceeding on the original suit and the notes on which it was founded, could not be revised in this manner. If the judgment was irregularly entered, as if no notice had been served on the defendant, so that it could not otherwise be considered than as a nullity, the court would entertain the motion.

In New York, motions to set aside a judgment which had been entered at a preceding term, or perhaps years before the motion, are frequently made and acted upon, as their merits may require. But by the common law, the judgment of a previous term can not be set aside on motion. And this is the doctrine of the Supreme Court. It is admitted that relief, in modern practice, is given on motion where, formerly, an *audita querella* was necessary. But this does not apply to the solemn judgments of the court. A clerical error in the entry of the judgment will be corrected at any time, but judgments can not be set aside on motion, after the term at which they were entered.

he motion is overruled.

HYDE v. FOLGER ET AL.

By statute, an action of ejectment, in Michigan, must be brought against the tenant in possession. If no one be in possession, suit must be brought against any one exercising acts of ownership over the premises, or who claims title thereto.

A bill being filed by complainant, representing that he had purchased and paid for the land, and prayed that a title might be decreed, and for an injunction, etc. It was objected that the name of Hyde, the complainant, is not known in the proceedings at law.

The court required the tenant in possession, to be named as co-complainant.

Mr. Witherell for complainant.

Mr. Backus for defendants.

OPINION OF THE COURT.

THE bill states that the land in controversy in 1840, was purchased by complainant from Thomas Folger, by his agent, Henry G. Folger, who was authorized to sell the same by letter. That the said Henry was then in possession of the same, the terms not specially recollected. But complainant purchased the land and paid for it, in property and money, the sum of seven thousand dollars.

In 1842 Thomas Folger died, and the land descended to his heirs, who are made defendants. That a deed was made by the said Henry, which, by the letter, he was not authorized to make. Since the death of Thomas, his heirs commenced an ejectment to recover the possession of the land, which action is still pending. And an injunction is prayed, and that the heirs may be compelled to make a good title, etc.

The motion for an injunction is resisted, on the ground that the name of Hyde is not known to the suit at law, his tenant being sued. By the 4th section of the act of Michigan, 1838, Revised Statutes, it is provided, "If the premises for which the action is brought, are actually occupied by any person, such actual occupant shall be named defendant in the declaration, by which the suit is commenced; if no occupant, the action must be brought against some one exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit."

Sec. 6. "No names, other than the real claimants and the real defendants, shall be used."

The court required the tenant Jerome to be named as co-complainant, and granted the injunction.

Under the statute, the name of the landlord may be inserted on the record, on proof of his claim, and he will be permitted to defend.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—JULY TERM, 1847.

GEORGE COOPER v. DAVID A. DUNGLEB.

An affidavit to hold to bail under the statute of Ohio, need not state that the affiant is a citizen of any other State.

Citizenship must be alleged in the declaration, to give jurisdiction to the circuit court, but it is never necessary to state that fact in a collateral proceeding.

Messrs. *Carles* and *Hulbert* for plaintiff.

Messrs. *Folger* and *Keith* for defendant.

OPINION OF THE COURT.

THIS is a motion to release the defendant from the custody of his bail, on the ground of the insufficiency of the affidavit of the plaintiff.

Since the act of Congress abolishing imprisonment for debt, to the extent that the same has been abolished by the respective States, no process to arrest a defendant in a civil case, can be issued except under the State law.

By the Practice act of Ohio, Swan's edition of 1841, it is provided, (8d sec.) "If any creditor, etc., shall make an oath or affirmation in writing, etc., that there is a debt or demand justly due to such creditor, of one hundred dollars or upward, specifying, as nearly as may be, the nature and amount thereof, and establishing one or more of the following particulars, etc., 'that he has property or rights in action, which he fraudulently conceals,' etc., the clerk shall issue a *capias*," etc.

In this case, the plaintiff made an affidavit to hold the

Jenks et al. v. Garretson.

defendant to bail, and among other things swears "that he is a resident and inhabitant of the State of New York, and that David A. Dungler, who resides in the State of Ohio, is justly indebted to him in the sum of \$1185 50, and that he has property and rights which he fraudulently conceals, and that he has disposed of his property with intent to defraud his creditors."

On this, a writ of *capias* was ordered for his arrest.

Two objections are made to the sufficiency of the affidavit.

1st. Because it does not contain a statement by the plaintiff that he is a citizen of the State of New York, it only says he is a resident and inhabitant of that State.

It is not necessary that the affidavit should contain an allegation of citizenship. Such an allegation is necessary in the declaration to give jurisdiction to the court, but it is not necessary in an affidavit to hold to bail.

And the second objection is, that the affidavit does not show the said Cooper is a citizen of any other State than the State of Ohio, nor does it show that he is an alien.

Such an allegation is not necessary, the jurisdiction must appear in the pleadings, but it is never necessary to state the fact on which it rests on any collateral procedure.

The motion is overruled.

JENKS ET AL. v. GARRETSON.

A default will not be opened, on motion, unless accompanied by a plea, sworn to under the rule of the court, denying the signature of the plaintiff, if the action be on a note. And the partnership shall also be admitted without proof.

Mr. *King* for plaintiff.

Mr. *Raymond* for defendant.

OPINION OF THE COURT.

In this case the action was brought upon a note signed by G. W. Garretson, on which there was a judgment by default.

The note, it seems, was signed by G. W. Garretson & Co.

A motion was made to open the default, without the usual affidavit, on the ground of the above misdescription of the note. The rule is as follows: "Ordered, that hereafter when a default is opened up on motion of defendant, it shall be held without special entry, as a condition of the permission to plead, that the defendant shall not question the citizenship of the plaintiff or defendant, and shall not require proof of the co-partnership of the plaintiff or defendant in the case, unless he shall forthwith file a special plea, verified by affidavit, and denying the partnership of either said plaintiff or defendant respectively, as set forth in the declaration."

And the 36th rule declares "that the general issue, unless sworn to, shall admit the execution of the instrument on which the action was founded."

The court held that both of these rules applied to the case.

Motion overruled.

**J. MORRISON PENDALL, WHO SUES FOR HIMSELF AND FOR THE
USE OF ALLIANCE MUTUAL INS. CO., v. JOHN RENCH ET AL.**

An individual may prove his own agency.

But where a special trust or confidence is placed in an individual, he can not transfer that to another.

Bills of lading, which required the signature of a principal agent, can not be held good if signed by a person designated by the principal.

Common carriers are responsible for property confided to them, except it be taken or destroyed by a public enemy.

Any damage done to goods in the course of transportation, must be made good by the transportation company.

J. Morrison Pendall, use of Alliance Mutual Ins. Co., v. John Rensch et al.

Mr. *King* appeared for the the plaintiffs.

Mr. *Fox* for defendant.

OPINION OF THE COURT.

THIS action is brought against the transportation company from Cincinnati to New York, by the way of the Miami canal and the lake, etc.

Jury Sworn.

N. P. Iglehart's deposition was read to the jury. He acted at Cincinnati as the agent of the company, signed the bill of lading marked A, which he was authorized to do. He knows of no order to change the consignee. The other bills were signed by Shaw, the confidential clerk of the witness, and who was authorized by witness to do so. The parties agreed as to the name of the transportation company.

E. T. Tucker, in his deposition, states that five hundred pieces of cotton bagging were delivered at Cincinnati, to be forwarded to New York. The goods were received at New York in a damaged state, and this action is brought for the damages.

It was objected that Iglehart was an incompetent witness, and that from the form of the contract, it must be held to be his, and not the contract of the transportation company.

The court held that Iglehart was a competent witness, and that he could prove his agency. That as to the contract or bill of lading signed by him, the court would regard more the substance than the form of it. But the court said, as regards the bills of lading, not signed by Iglehart, they could not be received as bills of lading. That the agency of Iglehart was, as he states, to make contracts for the transportation company, to transport freight from Cincinnati to Toledo, and to the eastern cities, was one of special trust and confidence, and could not be discharged by a substitute. But, as Iglehart swore that he made the contracts for transportation,

J. Morrison Pendall, use of Alliance Mutual Ins. Co., v. John Rench et al.

and adopted the signature of Shaw to the bills of lading, the court permitted the bills to go to the jury, not as bills of lading, but as a part of the deposition of Iglehart, showing the contract for the transportation of the goods in question.

It was contended there was no contract showing that the defendants were common carriers beyond Toledo; and this being the case, the injury received by the goods must be proved to have been done on that route, to make the defendants liable.

To this, the court replied, the contract proved by Iglehart showed that it was for the transportation of the goods from Cincinnati to New York, and that that was a matter for the jury.

The goods were damaged when delivered at New York. Appraisers were called and wardens, as is the custom on such occasions, to ascertain the amount of the damage. The charges for this service, and the charge of the auctioneer, who sold the goods, it is contended, constitute a part of the damages which the plaintiffs may claim. This was opposed by the defendants' counsel, who insists that the defendants can not be held liable for these.

The court instructed the jury that the damages were to be ascertained by the value of the goods at New York, in a sound state. This was proved to be 12½ cents per yard. The damaged goods were sold at auction at an average of about 10½ cents per yard. That the sale at auction not being objected to for unfairness, will be received by the jury as evidence of the damage done to the goods. That the difference in value between the sound and damaged goods, together with the expenses of the appraisers and wardens, will constitute the amount the plaintiffs are entitled to recover. That this will place the plaintiffs in the situation they would have been in, had the goods been safely delivered at New York; and that this is all they are entitled to. That the plaintiffs were not entitled to recover the auctioneer's charge, as this would have

been paid by plaintiffs, or charged as commission for selling the goods, had they been delivered without injury. The charge of the auctioneer is the same as the charge for selling on commission.

It appears that the persons who delivered the goods at New York required the sum of eighteen dollars to be paid as a condition of the delivery. This was an unjust and illegal charge, but it was imposed by the agents of the transportation company, and was paid before the possession of the goods could be had. The defendants are responsible for this sum. It was paid of necessity, by the plaintiff's agents, and it is an item which should be included in the damages to be recovered in this action.

The defendants, gentlemen of the jury, act in the capacity of common carriers. They hold themselves out to the world as such; and they are liable for all injuries done to the property they engage to transport; and nothing but the act of God, or the enemies of the country, can excuse a non-delivery of the goods, or an injury done to them. This results from the responsible business assumed by the defendants. Property of great amount is confided to them for the purpose of transportation, and for the protection of that property the utmost vigilance is not only required by all the agents of the defendants, but to secure the utmost safety to the goods, they are responsible for loss, except in the cases above specified.

The jury found for the plaintiff, in accordance with the instructions of the court, \$971 41 judgment.

LESSEE OF BOSWELL v. DICKERSON ET AL.

A statutory proceeding, which is not according to the course of the common law, must be strictly pursued.

A proceeding *in rem*, can only affect the property attached or named in the bill.

By a statute of Ohio, a proceeding in chancery against a non-resident is author-

Lessee of Boswell v. Dickerson et al.

ized, by publishing notice, where the title or boundaries of land is in question, or to compel a specific execution of such a contract, or the rescission of a contract for the conveyance of land. This, at most, can only affect land against which the proceeding is instituted, by being named in the bill.

Any proceeding against land, not so named, will be void.

So far as regards such property, the owner can have neither actual nor constructive notice.

A decree for money on such a bill, if such decree be within the power of the court, can not be made to affect the property of the defendant generally, or render it liable for the satisfaction of the decree.

Messrs. *Ewing and Wilson* for plaintiff.

Mr. *Lane* for defendant.

OPINION OF THE COURT.

THIS is an action of ejectment, brought to recover lot No. 7, in the United States reservation, at Lower Sandusky, in this State. A patent from the United States, dated 2nd September, 1831, to the lessor of the plaintiff, which includes the premises in controversy, was given in evidence. The defendants were admitted to be in possession.

The defendants, to show title in themselves, offered in evidence the record of a decree in 1826, of chancery, in the common pleas of Sandusky county, on which three executions were issued, the last one being dated in November, 1831, was levied on the lot in controversy, and sold, and the sheriff's deed to the purchaser was dated the 19th of May, 1832.

This record was objected to on the ground, that it was a proceeding against non-residents of the State, and the decree was in *personam* for the payment of a sum of money, which decree was to have the effect of a judgment, and on which an execution was authorized against the lands of the defendants; though they had received no personal notice, and that consequently the decree was void.

To this objection it was replied, that in the case of *Lessee of Boswell and others v. Sharp and Leppelman*, 15 Ohio, 447; in which that court held that the court of common pleas

of Sandusky, had jurisdiction in the chancery proceedings, and that the validity of that proceeding could not be questioned collaterally.

It appears that in 1816, Boswell, of the State of Kentucky, Reed, Owings and Hawkins, agreed to build a saw-mill on the public land at Sandusky, with the view of purchasing the land when it should be sold by the government. Boswell, Reed and Owings, were partners in the saw-mill, and were to pay the expenses. At the public sales, lot No. 9, in the Sandusky reservation, or a large part of it, was purchased by the above persons. Hawkins was to have one-fourth of the interest of the saw-mill, was to be the active partner, and superintendent of the building, and his share to be paid by labor.

At the public sale, Boswell and Owings advanced a part of the money. But it seems, at Wooster, in Ohio, where the sales took place, Reed and Owings abandoned the contract; and it was then agreed between Boswell, Barry, of Kentucky, Whittimore, of Boston, and Hawkins, to purchase lot No. 9, on which the building of the mill had been commenced. It was so purchased, and it was also agreed that Hawkins's share of the expense should be paid in labor on the mill, and in improvements on the land.

The above facts were substantially represented by Hawkins in his bill, and that in the construction of the mill, he expended five thousand dollars, of which he advanced two thousand six hundred dollars, besides his own time; that Boswell, Barry and Whittimore, against whom the bill was filed, have failed to convey to him one-fourth of the premises under the contract, or any part of them, they having acquired a title to two-thirds; nor have they accounted to him for the moneys he expended. And the complainant prays a decree for one-fourth part of the land, for which the defendants have a title, and also that they may account, etc.

Under the chancery act of 1824, this bill was filed in the

common pleas. By the 12 sec. of that act, jurisdiction is given over the rights of absent defendants, on the publication of notice, "in all cases properly cognizable by courts of equity, where either the title to, or boundaries of land may come in question, or where a suit in chancery becomes necessary, in order to obtain the rescission of a contract for the conveyance of land, or to compel the specific execution of such contract."

That the jurisdiction assumed under this statute is limited, will not be controverted. It is strictly a proceeding *in rem*. And it is only authorized in three cases. 1. Where the title or boundaries of land comes in question. This does not apply to the proceeding under consideration. 2. The rescission of a contract for the conveyance of land; or, 3. To compel a specific execution of such contract. There is no pretense that the bill could be sustained under the second ground. No rescission of a contract was asked. It was for the specific execution of the contract stated by Hawkins in his bill, that the bill was filed, and it is only upon that ground that it can be sustained, if indeed, it be sustainable.

Jurisdiction can only be acquired in two modes—one *in personam*, the other against the property. And it is immaterial whether the proceeding against the property be by attachment or in chancery, it is limited to the thing attached by the writ, or specified in the bill. The argument that jurisdiction being acquired in chancery for one purpose, may be exercised over all matters in controversy, relating to the same subject, between the parties, need scarcely be answered. The doctrine is a doctrine of chancery, but it can have no application to the present case. No man's rights can be affected without notice, actual or constructive.

The statute under which these proceedings were had, required notice, and had not this notice been strictly given, the whole proceedings would have been a nullity. Whether it was given or not, is not important, in regard to the question now before us, to examine. The right to lot No. 7, is the

only right before us, and in looking into the bill it will not be found that it refers to that lot, or gives notice to any one of a procedure against it. The title then under the decree must stand upon that part of it which ordered the payment of money, on which an execution was issued, and by virtue of which lot No. 7 was sold.

It is true the court in their decree, declared that all the lands in the county should be subject to be levied on by execution, to satisfy the decree. But what power had the court to make this order? How did they acquire jurisdiction over the lot? There was no proceeding against it. Its owners could have had no constructive notice that it was to be made liable for the decree. Chancery may decree the payment of money in many cases, and it may direct an execution to issue the same as on a judgment at law. But that is in a case where the court has jurisdiction over the person. Surely a precedent can scarcely be found where this has been done, where there is no pretense of notice, actual or constructive; and yet that is the case, as regards lot No. 7, now before us. The procedure of the court of Common Pleas, so far as relates to this lot, is void. They acquired no jurisdiction over it, and consequently, the sheriff's deed conveyed no title.

The decision of the Supreme Court of Ohio, does not stand in the way of this view. The Supreme Courts of the States fix the construction of the statutes of the States, and the courts of the United States will follow the established construction. But the decision named is not one of the character alluded to. It does not establish the construction of the statute. The question as to this procedure came collaterally before the Supreme Court of the State, and in that form only has the question been considered by that court. And that can not be called the construction of the statute. The court held, in the manner in which the record came before it, the decree could not be treated as a nullity. There was no judgment given, that a part of the proceedings were not void.

But suppose the Supreme Court had decided that the property of an individual, under the statute, without notice actual or constructive, was liable to be sold, I should have felt bound to hold the decision as void. The legislature required notice. But should the legislature assume the power to dispose of the property of non-residents without notice, would their act be regarded? Such a procedure would be opposed to the immutable principles of justice. And under the doctrine of the Supreme Court of the Union, the law would be held void. *Fletcher v. Peck*.

As the views of the court seemed to excite surprise in the counsel for the defense, and as the question was important, it was suggested by the court, and assented to by plaintiff's counsel, that a division of the judges, *pro forma*, on certain points, should be certified to the Supreme Court, as that was the only form in which the case could be taken before that tribunal.

The points certified, were—

1. "Whether or not the proceedings and decree of the said court of common pleas of Sandusky county, set forth in the record above stated, are *coram non judice*?"

2. "Admitting said proceedings and decree to be valid, so far as relates to the land specifically described in the said bill in chancery, whether or not said proceedings and decree are *coram non judice* and void, as relates to lot number seven, in controversy in this case, and which is not described in said bill in chancery; or in other words, whether said proceedings and decree are not *in rem*, and so void, and without effect as to other lands sold under said decree."

The answer of the Supreme Court was, "that the proceedings and decree of the court of common pleas of Sandusky county, as set forth in the record are *coram non judice* and void, as relates to lot number seven." The other point was not answered.

LESSEE OF BUEL v. JOHN TULEY.

Judge Symmes's purchase, between the Miami rivers, was completed only for one million of acres.

A base line was run from the Great Miami to the Little Miami river, so far from the Ohio river, as to admit of a straight line.

And lines running north from the termini of the base, were run so as to include the land purchased.

Lines were also run from the base, called meridian lines, north, from every mile on the base line, where a corner was marked, and at the termination of each mile on those meridian lines, a corner was marked for sectional corners, extending through the first and second ranges.

The east and west lines, being run to these marked corners, required zig zag lines. Afterward an east and west line was run by authority, as the northern boundary of the second range, and consequently the southern boundary of the third range.

This left strips of land between the line thus run, and the zig zag lines, formerly run, which gave rise to the present controversy.

The court instructed the jury, that the lines by which the purchase was made, if run by authority, would govern. But if there was no such line, then the line run by the proper authority must govern.

Messrs. *Campbell* and *Corwin* for plaintiffs.

Messrs. *Wood* and *Ewing* for defendant.

OPINION OF THE COURT.

THIS controversy arises out of the old and new lines, as they are called, both of which were run as the northern boundary of the second range, in Judge Symmes's purchase, and consequently, the southern boundary of the third range, between the Great and Little Miami rivers.

On the 29th of August, 1787, Judge Symmes submitted a proposition to Congress to purchase for himself and associates, all the lands lying between the Miami rivers, south of a line drawn due west from the western termination of the northern boundary of the grant to Sargent Cutler & Co., etc. But the contract first executed was only for one million of acres, terminating at a point on the Ohio river twenty miles above the mouth of the Great Miami. On a survey, this was found to terminate within the limits of the city of Cincinnati. After-

ward, in 1792, on the petition of Judge Symmes, Congress passed a law altering his contract so as to be bounded on the south by the Ohio river, and on the east and west by the Miami rivers, and on the north by a parallel of latitude so run as to include the million of acres.

On the 26th November, 1787, Judge Symmes published a pamphlet containing the "Terms of sale and settlement of the Miami lands," which regulated the price of the lands, the conditions of settlement, and other matters connected with the settlement of the country.

By the contract of the "Board of Treasury" with Judge Symmes, the purchasers were required to survey the tract into ranges, townships, and sections, at their own expense, and surveyors were employed by the Judge to do this work. The principal surveyor was directed to run a line east and west, from one Miami river to the other, sufficiently north to avoid the bends in the Ohio river, and to give a straight line for a base, on which he was directed to plant a stake at the termination of each mile. The assistant surveyors were then directed to run meridian lines by the compass, from each of those stakes, and to plant a stake at the termination of each mile, for a section corner. The purchasers were then left to complete the surveys by running east and west lines, at their own expense, to connect these corners.

It must be perceived that this mode of executing the surveys was exceedingly defective, and would cause a zig zag line in every tier of sections, so as to strike the meridian, or north and south lines, at the sectional corners. These surveys extended only to the first and second ranges, which, with a few miles north of the military range, included the million of acres purchased by Symmes, and for which he obtained a patent. The third, or military range, had been conveyed by Symmes to Gen. Dayton, by deed dated 30th October, 1794.

Judge Symmes, in the above surveys of the meridian lines, had required the sectional corners to be marked only to the

northern limit of the second range; and they were directed to continue those lines north, without marking sectional corners, six miles, which would terminate at the northern boundary of the third range, and consequently the southern boundary of the fourth. To supply this defect, Gen. Dayton appointed Col. Ludlow, who was, practically, the principal surveyor in the Miami country, and one of its most enterprising, meritorious, and adventurous pioneers, to make the survey and establish the section corners. The lines run by him, as boundaries of the range, interfere in some instances, with the corners previously made; but having been run by competent authority, they were confirmed, so far as they did not conflict with the survey directed by Judge Symmes, under the act of Congress.

On the 8th of February, 1789, Dunlap returned a survey which he had run, east and west between the two Miami rivers, to ascertain how far north the third range would extend, by fixing the northern boundary of the second range. The line run by Col. Ludlow, in June, 1790, was a straight line. In many parts of this line strips of land were left between it and the line which was made to strike the corners of the sections, as marked on the north and south lines, and this has given rise to the present controversy between the parties before us.

The patent of Judge Symmes was dated the 30th of September, 1794, and the deed from Symmes to Muer, for section thirty-one, was dated the 27th of October, 1794. But the entry of this section was made by Mrs. Gaston, by the location of a warrant upon it (issued by Judge Symmes) in May, 1789. Muer afterward purchased the land, subject, of course, to the east and west line which might be run. At the time of the entry, the survey of the second range was not complete, as the northern boundary had not then been run. Dunlap's line was not intended to be the northern boundary of the second range. It can not be considered as an authoritative line for

that purpose. The object was, in running it, to ascertain the southern boundary of the third range. To determine that question, the northern boundary of the second range should have been ascertained; but as Dunlap acted under no authority, his line could only be considered as an experiment for the purpose stated.

The line of Col. Ludlow was run under authority, and as such must be regarded. Not, it is true, as altering boundaries which had been previously established by the proper authority, and under which purchases had been made; but as establishing the line beyond controversy, in all cases where purchases were made subsequently. This line is colored yellow on the map. In 1807 Mr. Heaton surveyed the section line of thirty, which he designated by the blue lines Y, V, U, south, running to the old corner north; and in 1811 he, in company with Henderson, ran the yellow line, (Ludlow's,) and found trees regularly marked. Dunlap's line was north of Ludlow's.

Mr. Bigham, an old and practical surveyor, says that the corners of sections were marked on the north and south lines of range two, but the east and west lines were not, at first, run. He says if the plaintiffs are limited to the red line, as marked on the map, they will have five hundred and sixty-nine acres; by the yellow line, six hundred and ninety acres.

Ephraim Catterlin says the north and south lines are about forty rods apart; and that McKane, the owner of a part of section thirty, said he should never claim north of the south line. The same thing is stated by Sheely, who heard the remarks of McKane some twenty-seven or eight years ago. S. Catterlin, a witness, heard McKane say he did not own the land, though he was cutting wood on it. Witness saw him dig down six inches; found a stone which he said was his corner. This corner was near Tuley's fence, which it is alleged is near the south line.

Richard McKane conveyed to Robert McKane. The deed from Symmes to McKane was for one hundred and six acres,

James G. Wilson v. John H. Stolley.

dated 7th of April, 1798. And there is no controversy as to the right of the lessors of the plaintiff; the point in contest is, as to boundary.

The purchasers in the third range, claimed up to Ludlow's line, as their southern boundary; and several of the witnesses say that McKane did not claim north of that line.

The court instructed the jury, that when land is purchased by established lines, without the consent of the purchaser, those lines can not be altered, especially, so as to reduce the quantity of acres purchased. But if, in this case, there were no east and west line established, as the northern boundary of section thirty, when it was purchased; and that boundary was open to be established; the purchaser would be bound by the Ludlow line, it being authoritatively run. Or if, at the time of the purchase, Dunlap's line had been run, but had not been recognized, as the true line, Dunlap not being authorized by Symmes to make the survey, that line does not limit the rights of either party. And especially after the Ludlow line was run, the occupiers and owners of section thirty recognized that as the true line, and claimed up to it, and not beyond it, for a great number of years; and rights have been acquired by purchasers north of that line, and extending up to it, and parties on both sides of the line have so claimed for many years; and this was known to the lessors of the plaintiff at the time their rights were acquired, they are bound by that line, and can not claim beyond it. The jury found the defendants not guilty.

JAMES G. WILSON v. JOHN H. STOLLEY.

Before JUDGE McLEAN, at Chambers, April, 1847.

Reasonable notice is required to be given to the defendant, of the time and place where a motion for an injunction will be made.

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The defendant will be heard in opposition to the motion, and he is permitted to file his answer.

Affidavits will be received in behalf of both parties, especially in patent cases.

Under the rules of the court, a bill which requires an answer, must contain interrogatories.

Messrs. *Telford* and *Norton* for complainant.

Messrs. *Walker* and *Fow* for defendant.

As this is an application to enjoin the defendants from an infringement of a patent, by the practice in such cases the defendant will be permitted to file his answer; and affidavits in behalf of both parties will be examined on the motion for injunction. The bill prays for an injunction, and that the defendant may answer, but it contains no interrogatories; and on this ground it is objected that the bill is defective.

The 5th section of the act of 2d March, 1792, provides that "a writ of injunction shall not be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same."

This notice was designed to enable the defendant to resist the application for an injunction; and this resistance can be more effectually made by permitting the defendant to file his answer. Affidavits are heard in behalf of both parties, especially in patent cases. This course seems to come within the spirit of the above section, and it enables the judge to act on the motion with a better knowledge of the equitable rights of the parties.

As no precise rules have been adopted in regard to this procedure, except that a reasonable notice shall be given of the time and place of the motion, it has been usual to give a reasonable time for the preparation of the answer and the taking of affidavits. The delay of the defendant in preparing his answer in this case, seems not to be unreasonable: and no very strong reason is perceived why the defendant should not be permitted to show, as preliminary to a motion for an injunction, that the bill, upon its face, is materially defective.

The question now made is, whether an original bill for relief, which calls upon the defendant to answer, must not contain interrogatories, under the rules of practice adopted by the Supreme Court.

The 41st, 42d, and 43d rules make the interrogatories a part of the bill, and prescribe its form; and the 40th rule declares that "a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer"—which must be specified in a note at the foot of the bill, in the form stated.

From this it appears the defendant is not bound to answer the bill, unless special interrogatories, of the form required, are contained in it.

The 18th rule declares, that "it shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance: in default thereof, the plaintiff may, at his election, enter, an order (as of course) in the order book, that the bill may be taken *pro confesso*," etc.

This rule applies to all bills where an answer is required. Now, if the bill contain no interrogatories, and the defendant is not bound to answer it, can he be in default for not answering? He can never be in default except for neglecting to do that which he was legally bound to do; and if he be not in default, no decree *pro confesso* can be entered against him.

This seems to be a reasonable construction of the above rules, and it gives to each one of them a proper effect.

The bill being defective for want of interrogatories, it is unnecessary now to consider the other objection, that the bill does not require an answer under oath.

JAMES G. WILSON v. JOHN H. STOLLEY.

Before JUDGE McLEAN, at Chambers, April, 1847.

Where a bill is filed to enjoin the defendant from running a machine, in violation of the right of the assignee of the patent, and the defendant sets up a license which the complainant alleges has been abandoned, but no such statement is made in the bill, proof of abandonment can not be received.

In chancery, as at law, the foundation for the evidence must be laid in the pleadings.

To admit evidence of abandonment, the bill must be amended, as a special replication, under the rules of practice, is not permitted.

Where one licensed to run a patented machine, sells such machine, the license to run does not necessarily pass with such machine.

Messrs. *Telford* and *Norton* for complainant.

Messrs. *Walker* and *Fox* for defendant.

THE complainant in his bill represents that he is the assignee of Woodworth's patented planing machine, renewed and afterward corrected by the administrator; that being in the enjoyment of this valuable patent, in the county of Hamilton and elsewhere, about the month of June, 1846, the defendant, without any legal grant or license, did begin to make, use, and vend to others to be used, the machine aforesaid, and so continues, in violation of the complainant's rights; and he prays for an injunction and for general relief.

In his answer the defendant admits the emanation, extension, surrender, and renewal of the patent, but requires proof of the complainant's title. He admits that he is running one of Woodworth's machines, under a license from Brooks & Morris, the former owners of the right now asserted by the complainant; and he avers that he has performed all the conditions on his part, to be performed by the contract of license, except the payment of the money weekly, which he offered to pay frequently, but which was refused by Brooks & Morris, and afterward by the complainant; that he is now ready to pay the same as the court shall direct; and the defendant

alleges that the complainant in several particulars has violated the contract.

Certain affidavits were read to support the bill, and others in support of the answer.

The complainant does not controvert the license set up in the answer, but he insists that the defendant has failed to comply with the conditions on which it was granted, and was to be continued; that, being bound to keep the machine running, and agreeing that a suspension for two weeks should be considered as an abandonment of the license, he sold the machine, and suspended the use of it more than three months; that the sale of the machine was in itself an abandonment of the license, as the license was limited to the use of one of the two machines owned by the defendant, at the time of the contract, both of which he has since sold; and it is contended that the sale of the machine for use, conveyed to the purchaser impliedly, if not expressly, his right to run it.

The defendant objects to the ground of abandonment assumed by the complainant, as there is no such issue made by the pleadings, and contends that the complainant must be limited to the case made in the bill.

In chancery, as at law, the proof must correspond with the allegations in the pleadings. But the complainant insists that he may show an abandonment of the license, which, if established, would be equivalent to no license, and this would support the allegation of the bill, that the defendant is running the machine without authority.

The bill charges the defendant with using the machine without authority; but the defendant denies this, and sets up a license on certain conditions, all of which he alleges have been performed on his part. The genuineness of this instrument is not denied, but the complainant alleges that the contract of license has become void and inoperative by reason of certain acts of the defendant; but what these acts are, does not appear in the pleadings. At law there can be no doubt

that this state of facts would require the plaintiff to plead over and allege the acts of the defendant, by which the license had been abandoned. The issue, whether of law or fact, would be thus made. But, without a proper plea, giving notice to the defendant, the facts could not be proved. A replication to the plea, merely traversing the license, would not lay a foundation for evidence of abandonment; and the same rule governs in chancery.

The 45th rule of chancery practice declares, that "no special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same." As a special replication is not allowed, the question of abandonment can only be brought before the court by an amendment of the bill.

The license, on the conditions stated, gives to the defendant "the right of running either of his two machines, provided he does not run more than one of them at the same time." As a reference is made in the contract to the two machines owned by the defendant at the time, it is contended that the license can not be construed to extend to any other machine.

The license was the result of a compromise between the defendant, who had one of two of Woodworth's machines in operation, and Brooks & Morris, in whom the exclusive right to run those machines in the county of Hamilton was vested; and being in possession of two planing machines, the right to run either was given to the defendant. Does this right extend to any other similar machine? Suppose both of these machines had been destroyed by fire, or in any other manner, could not the defendant have purchased another machine and used it under his license? This, it is believed, is not denied by the complainant. But it is alleged that the defendant sold both of his machines, and having done so, he had no right to purchase another. Now the right to use the machine can not be made to depend upon the illegality of the

sale of the two machines, or the purchase of another. Whether the sale was an abandonment of the license, can not be now considered, as there is no such averment in the bill: and if the purchase of another machine, or the sale of the two, as stated, be a violation of the rights of the complainant it is not a matter within the license, and can not be made to operate either for or against it.

The contract authorized the defendant to run one of Woodworth's planing machines, and the reference to the two machines then owned by the defendant, seems to have been made with the view to give the right to use either, but not both at the same time. Such a license will always be construed to run a machine, unless in express terms it be limited to the identical machine referred to. There is no such limitation in the license to the defendant.

Whether there was a transfer of the right under the license, on the sale of one or both of the machines by the defendant, can not be examined, as there is no such allegation in the bill. The sale of a machine does not necessarily carry the right in this case, as it may have been made to a person who had, or expected to obtain a license. A sale by the patentee of the machine does give an implied right to use it, as such right is exclusively vested in him and such persons as may have received it from him. But this inference does not necessarily follow, where the sale of a machine is made by a person who has no exclusive right, but a license merely of use. So that, in this latter case, the extent of the transfer must depend upon the facts and circumstances proved. That such a right, being property, may be equitably conveyed, is admitted.

As the main, if not the only object of the bill, is to enjoin the defendant from running the machine he now has, which object can only be reached by showing an abandonment of the license, it is not deemed necessary to inquire whether there is a case made to enjoin the defendant from constructing or vending the machine.

LESSEE OF ROBINSON AND WIFE v. B. MOORE ET AL.

Marked lines and corners control courses and distances.

Within the Virginia Military Tract, surveys were run early, and at the hazard of the lives of those making them.

The Indians were numerous and hostile, and under such circumstances great accuracy could not be expected.

Surplus lands do not vitiate a survey, nor does a deficiency of acres called for in the survey, operate against it.

Wherever the boundaries can be established, they must prevail.

In the present case several of the courses were established, and parts of lines; and they conduce to show the claims of the respective parties.

Messrs. *Taylor, Stanbery and Bond* for plaintiff.

Messrs. *Tracy, Wright and Peck* for defendants.

OPINION OF THE COURT.

THIS is an action of ejectment, in which the plaintiff claims a thousand acres of land in the Virginia military district, of one hundred and eighty acres of which, the defendants are alleged to have possession. The decision of the controversy depends upon the establishment of the lines and corners of his survey as claimed by plaintiff. In that event the defendants will be found in possession of one hundred and eighty acres as above stated. The jury were sworn, and a survey by the county surveyor, who was also sworn as a witness, and other witnesses on both sides were examined. The court observed to the jury, that the courses and distances called for in the patent, would be controlled by marked lines and corners. But where no marks can be found or established by the evidence, the courses and distances must govern. On the plat laid down, the beginning is admitted by all parties to be on the Ohio river, at the letter A. At that place a beech tree twenty-six inches in diameter, bears the ancient marks of a corner. From thence, on a westerly course, the surveyor run two hundred and seventy-eight poles to a stake, and a pile of stones, and a white oak is found bearing the ancient marks of a corner; supposed to be the back corner of

the plaintiffs' survey. At that place, or near it, no other corner is found or known to exist. From thence, the surveyor run a southerly course, four hundred and twenty-seven poles to a stake, near a black walnut, now lying down, (the bark off, and a block formerly taken out) shown, by persons present, as an original corner tree, no other trees marked corresponding with the patent calls found, a black oak with marks and ash trees, without marks, standing near. From this point he run the distance called for in the patent, and searched for a corner, but found none.

From the above supposed corner marked, the surveyor run an easterly course three hundred and four poles, passing the corner of survey 1625, two beeches and a sugar tree, now down, and partially destroyed; at 140 poles, passed a beech bearing ancient marks, took a block therefrom, and found the date of the marks to correspond with the date of the survey, to a large beech at D, bearing ancient marks, thence up the river, with the meanders thereof to the beginning.

From this survey it will be observed by the jury, that starting from the admitted corner at A, the line was run to the second corner at B, where a white oak tree was found marked as a corner. At this place, the patent calls for a black oak as a corner. The plaintiff claims to run beyond this corner to M, but no corner trees are marked at that place, nor were any line trees found leading to it.

From the second corner we pass to the third. At this point the patent calls for a walnut, ash and white oak, as corner trees. A walnut and a black oak are found regularly marked as a corner. The surveyor run further in the same direction to the letter N, as claimed by the plaintiff, and the distance called for in the patent. But he found no marked trees on the line, or at the place claimed as a corner.

Returning to the third corner, he run to the corner D, on the Ohio river. The patent calls for three beeches marked as corner trees; only one beech is found so marked. On this

last line there were ancient marks made, apparently with a tomahawk.

If the points above described are to constitute the corners of the plaintiffs' survey, then the defendants are not guilty of the trespass complained of. You will observe, gentlemen, that this survey was made in 1787. This was at a very early period of our history in the west. In making surveys, those concerned were in imminent danger from the savages, who, at that time, possessed the country, and were masters of it, with the exception of a small settlement at Marietta, at Columbia, and at Vincennes. At that time, it is known by all who are familiar with surveys in this district, that lines were often run without marking, as a measure of safety to the surveyors. The Indians not unfrequently would follow the newly marked lines, and attack those engaged in running them.

From the lapse of time, it being more than half a century, it is not astonishing that the corner trees are not all found. On the contrary, under all the circumstances, including the improvements in the country, it is rather singular that so many marked trees should be found as the surveyor has described.

If these corners should establish the boundary of the plaintiff's land, he will own considerably less land than his survey calls for. Should the lines be extended beyond these corners, as he claims, he would still have a less quantity than his patent calls for—in one case by ten acres, and in the other by twenty-five acres. But this is a consequence of the inaccuracy of early surveys. Had the survey contained several hundred acres more than the patent calls for, the plaintiff would have held the surplus, on the establishment of his lines and corners, including it.

It seems, however, that no corner tree has been found marked at the places where the distances, called for in the patent, terminate. And as before remarked, distance can

Lessee of Ransdale v. Jacob Grove.

not govern, if marked corners can be found, called for in the patent.

The jury found the defendants not guilty.

LESSEE OF RANSDALE v. JACOB GROVE.

To admit parol proof of the contents of a deed, the original must be proved to have been lost or destroyed. That the original was lost in crossing a river, or that it is in the hands of certain purchasers, is not sufficient.

The statute of limitations does not run against non-residents.

A deed may be presumed from a long possession, and under circumstances favorable to such a presumption. Such presumption can only be drawn, when it would seem naturally to arise from the facts in the case. But it may be rebutted.

The presumption of payment of a mortgage arises, where no interest on it has been paid for twenty years. But the relation of vendor and vendee must exist to authorize such a presumption.

Where a purchase has been made of one who had no title, it would be difficult to presume a title from a stranger.

Messrs. *Massie* and *Stanbery* for the plaintiff.

Messrs. *Corwin* and *Thompson* for the defendant.

OPINION OF THE COURT.

THIS is an ejectment for the recovery of land in Highland county. The plaintiff gave in evidence a patent from the United States, for the land in controversy. Marriage of some of the plaintiffs to the heirs admitted.

The defendant gave in evidence a copy of a survey of the land, dated the 16th of June, 1797, recorded for Ransdale, by John O'Bannon. And also, a certificate from the land office as to the procurement of the patent; a receipt for tax on the land, in 1801, paid by Macker, for Ransdale; other receipts of a similar character were before the jury.

Thomas Saunders, a witness, has lived in Highland county, since the fall of 1805-6. Is acquainted with the

land in controversy. He lives six miles from it. Has been a county surveyor. He was acquainted with James Macker, and never heard of any one claiming the land but Macker. Linn acted as his agent. Col. Pope also acted as the agent of Macker; and in 1806, Macker and his agents sold the land to the defendant and others. In 1824, the residue of the land was sold by Green, as agent of Macker.

Jonas Green, in his deposition states, that having possession of the patent, he either left it with one of the purchasers or lost it in crossing the Rappahannock river, in Virginia. On this evidence of the loss of the patent, the defendant's counsel moved the court to permit parol evidence of its contents.

But the court overruled the motion, and said the evidence of the loss of the patent was not satisfactory. Its loss, indeed, was not proved. The witness either left it with one of the purchasers, or lost it in the river. Now, it does not appear but that one of the purchasers with whom the paper was left, may still have it in possession. The purchasers are numerous, but not so numerous that they can not be examined as to this fact. And until that shall be done, there is no proof of the loss of the paper.

It may be observed that all patents issued by the General Government, are recorded at Washington. And if no record can be found there of the patent referred to, it is strong evidence against the existence of such a paper. Several of the witnesses speak of the lands in question as having been purchased twenty-five or thirty years ago.

A copy of the warrant issued to Thomas Ransdale for 4,000 acres, on which the location was made, was given in evidence without objection. And the counsel agree that the location was made by O'Bannon, 2000 acres in Ohio, and 2000 acres in Kentucky, in 1787. A copy of the patent to Thomas Ransdale, from the Governor of Kentucky, was read.

It was proved that the locator of such warrants received, usually, as his compensation, one-third of the land—sometimes one-half, or one-fourth. Hord, a land speculator, set up a claim to this land in 1843; but it seems he had no satisfactory evidence of title.

The demise in the declaration was laid December 1st, 1843. One of the depositions proves that one of the lessors died in 1843, and objection was made that that defeated the plaintiff's action. But the court remarked, if the effect would be as suggested, the deposition did not show that the death took place before the demise laid; it may have occurred afterward.

It is admitted that Macker had no title, and, of course, could convey none to the purchasers. Nor can the statute of limitations apply, as the lessors of the plaintiff are all non-residents.

The only ground of defense that remains for the defendant is, the lapse of time since they entered into the possession of the land, from which it is contended a deed may be presumed. Such presumption, under certain circumstances, may be admitted. There are some things which may be presumed as facts, from the lapse of time, aided by circumstances. As where there has been no payment of interest on a mortgage, and no circumstances appearing to explain the neglect, the mortgagor can not redeem. *Hughes v. Edwards*, 9 Wheat. 489. The payment of a bond may be presumed after the lapse of twenty years, exclusive of disability of the holder to sue. *Dunlop v. Ball*, 2 Cranch, 180. After a long possession in severalty, a deed of partition among tenants in common may be presumed. *Hepburn et al. v. Auld*, 5 Cranch, 262. Presumption of a grant, arising from lapse of time, is applied to corporeal as well as to incorporeal hereditaments. But it may be encountered and rebutted by contrary presumptions; and can never arise where all the circumstances are entirely consistent with the non-existence

of a grant. *A posteriori*, they can never arise where the claim is of such a nature as is at variance with the supposition of a grant. *Ricard v. Williams*, 7 Wheat., 59.

Juries are sometimes instructed to presume conveyances between private individuals, in favor of one who has proved a right to the enjoyment of the property, and whose possession is consistent with the conveyance to be presumed; especially if the possession, without such conveyance, would have been unlawful. The facts in this case would not seem to authorize the presumption of a deed from Ransdale or his heirs, to the defendant. There has been no relation of vendor or purchaser between them, to authorize such a presumption. On the contrary, it is in evidence they acquired their title from a different source. It would not be difficult to presume a title from Macker, under the circumstances. But the foundation of this presumption goes against the presumption as to Ransdale. From the deaths and minorities of those who held under Ransdale, it would be difficult to say that the presumption could be strengthened by a supposed acquiescence.

O'Bannon, it seems, was the original locator of Ransdale's warrant, and there is no evidence that Macker or the defendant ever claimed under him. There is no evidence that Macker ever had a shadow of title, unless his sale to the defendant and others shall be so considered. This presumption must not only be consistent with the facts of the case, but it must appear naturally to arise out of them.

This question, it is contended, is the same at law as in chancery. This may be admitted, but how is it applied in chancery? Generally, it is raised in favor of a legal title against a stale equity. The person under a deed has entered into possession of real estate—has enjoyed it many years, and made valuable improvements upon it; at length a dormant equity is set up, of which the legal owner had no notice. Such a title is not favored in equity. The title of Macker was always open to investigation. The exercise of a little

vigilance would have ascertained that the land sold by him belonged to another.

The case of the defendant is an exceedingly hard one. He and the other purchasers under Macker, entered upon the land in a wilderness state. It has been improved so as to present to the eye highly cultivated farms, orchards, comfortable dwellings, and every other convenience which could reasonably be desired. To accomplish this, the strength of their manhood has been exhausted, and some of them have gone down to the grave. The widows and children of some may remain. Under such circumstances, the ordinary sympathies of humanity should induce the claimants to compromise this matter on liberal terms.

Verdict for defendant.

HALDERMAN ET AL. v. BECKWITH ET AL.

The general usage of a river, in regard to the navigation of ascending and descending boats, and which, from long experience, has been established as a precautionary measure, should be followed by pilots and others.

A descending boat, when apprehensive of a collision, will stop her engine, and float, leaving the ascending boat to choose the best mode of avoiding a contact.

If the plaintiff is in fault, he can not recover damages; nor where both parties are in fault, by the common law.

The maritime rule apportions the damages as the faults of the respective boats may be established.

A State has no power to regulate a commerce which extends beyond its jurisdiction.

Where a commerce begins and terminates within a State, it has the exclusive commercial power over it.

The Louisiana law, which adopts many regulations in regard to the navigation of the Mississippi, can not affect boats engaged in carrying on commerce between the State of Louisiana and other States.

Such a power exercised by the States, would be destructive to a general commercial intercourse.

What damages may be recovered from an offending boat?

Messrs. *Fox* and *Lincoln* for plaintiff.

Messrs. *Walker*, *Kebler* and *Taylor* for defendants.

OPINION OF THE COURT.

THIS action is brought by the plaintiffs, to recover damages for an injury done to the Yorktown, the plaintiff's boat, by the Talma, the boat of the defendants. The collision took place at the Dead Man's bar chute, on the Mississippi river, the 16th of March, 1845. The Yorktown was descending the river, and the Talma ascending it.

Coleman Stewart was pilot on the Yorktown, and between one and two o'clock at night was descending the Dead Man's bar chute, about two hundred yards from the Louisiana shore. When he first saw the Talma, she was ascending the river near the opposite shore. The Yorktown was descending the river in the usual channel for descending boats. The Talma changed her course, and ran across the river until she struck the Yorktown almost at a right angle, or nearly so, and cut a hole through her hull as large as a flour barrel. The Yorktown was running parallel with the shore.

William B. Dodson was mate of the Yorktown, and was on her hurricane deck nearly over the place where the Talma struck her. When he first saw the Talma, she was running up the river. The Yorktown was nearly parallel to the shore, on the opposite side. The Talma turned nearly across the river. The distance between the boats would have been eighty yards, had not the Talma changed her course. It was a star-light night. Witness could see the shore distinctly. A descending boat could be seen from three-quarters to a mile. When the danger became apparent, nothing could be done to avert the collision.

James E. Workman was a passenger on board the Yorktown, and was on the boiler deck when the collision occurred. The Yorktown pointed down the river; the Talma appeared to run across it. The Yorktown was from two hundred and fifty to three hundred yards from the shore. The witness

took particular notice of the position of the boats, by the request of the captain of the Yorktown. The Talma backed out. The witness could see the shore distinctly. He heard captain Sturgeon, of the Talma, say, if Walpole had been at the wheel, the accident would not have occurred.

John Hickman was a passenger on the Yorktown, and was on the starboard guard when the collision took place. The Talma was about fifty yards from the Yorktown when witness first went out. Witness was formerly a pilot. The boats were about three hundred yards from the shore when the contact took place. He could see the shore distinctly.

Henry Pierce was a passenger on the Yorktown. The Talma struck the Yorktown from two hundred and fifty to three hundred yards from the shore. He could see a boat on a straight part of the river two or three miles.

Jacob Beber was a passenger on board the Yorktown, and was on her larboard guard when the collision took place. The Talma struck her on the starboard side. The Yorktown was running down the river, two hundred or two hundred and fifty yards from the shore. The Talma turned across the river and struck the Yorktown.

James W. Venience was a passenger; the Yorktown was running down the river; the Talma turned across it, appearing to have a full press of steam, until she struck the Yorktown.

William F. Davis was a passenger on the Talma, and was, at the time of the collision, sitting on the boiler deck, over the hatchway wheel; saw the descending boat before the contact. It was a clear night; the Talma was running up under full way; she headed across the river, and the witness saw that a collision was inevitable. After the Talma struck the Yorktown, the engine went ahead, one-fourth or half a minute.

James Bell was engineer of the Yorktown, and was on watch. Both engines of the Yorktown were stopped, and he

coupled up the engines for backing. Saw the Talma coming out square from the shore. The Yorktown was two hundred and fifty or three hundred yards from the shore. Everything was done, that could be done, to avoid the collision by the Yorktown.

The above statements are fully corroborated by nine other witnesses. And fifty-six witnesses were examined, being pilots, many of them having great experience and being well acquainted with the navigation of the river, and especially at the shute where the collision took place; and they all say that at the stage of water then in the river, the Yorktown was in her proper track; and the track of the Talma, as an ascending boat, was near the shore. And they all concur in saying, that the usage of the river is for the descending boat to keep on her way, and the ascending boat was bound to do the dodging, or avoid a collision with the descending boat. That when the peril becomes great, the descending boat should stop her engine, so as to slacken her speed, and make the duty of the ascending boat easier to avoid a collision. On such occasions the big bell is usually rung.

In behalf of the defendants, many witnesses were examined, but they were less numerous than those of the plaintiffs.

William Pennington, who was pilot of the Talma, says, when the Talma entered the shute, she ran as near the shore as was safe. When he first saw the Yorktown, she was within one-fourth of a mile of the Talma. As soon as the Yorktown hove in sight, the mate said that boat was running on them. He stopped the engine, directed it to back, and the Talma was going back when the collision occurred.

Thomas Miller was on board of the Talma, and a watchman called his attention to the Yorktown, which was from three to six hundred yards distant. The Talma was as near the shore as safety would permit. The stern of the boat was very near the shore. Her engine commenced backing before the collision.

William O. Irvin was assistant mate on the Talma. When the collision took place, the bells of the Talma were ringing violently. The stern of the boat was so near the shore, as to prevent the lowering of the yawl.

Michael Rogers was assistant engineer on the Talma. He was in his berth when the collision took place. Ran out on the starboard side over the boiler deck. The boats had been separated ten or twelve yards. The stern of the Talma was near the shore.

James Mann was second engineer on the Talma. The boat was too near the shore for the Yorktown to run between her and the shore. Before the collision, the larboard engine had made three revolutions backward, and the other engine one. The force of the Talma was nearly exhausted when the boats came together.

Charles M. Corrie was mate on the Talma, and was on his watch when the collision took place. When he first saw the Yorktown, she was from three to five hundred yards distant. She seemed to be coming on the Talma. Witness ordered the bell to ring, then to back hard. The Yorktown ran down the stream, turned her bow from the shore, which threw the stern of the boat round, so as to strike the Talma. The Talma was so near the shore that it was not safe to let down the yawl. No mistakes made by Pennington within the knowledge of the witness as to ringing the bell.

Eleven other witnesses were examined, who corroborated many of the facts stated by the above witnesses. And twenty-three pilots were sworn, who agree in saying, that the proper place for the Talma as an ascending boat, was from thirty to fifty yards off the shore. In this, there is a concurrence of all the pilots. And the witnesses all agree that it was a star-light night.

The court have been requested, gentlemen of the jury, to state their views of the law on several points. And first, the court charge you, that if the collision was a misfortune,

without the negligence of either party, the plaintiff can not recover. There can be no wrong in such a case, which the law will redress, where the persons navigating the respective boats, possessed the proper skill and experience and were chargeable with no negligence, and had no intention to do wrong. This is the common law rule, not the maritime.

And the court will also charge you, that if the collision resulted from the negligence of the plaintiffs, they can not recover. In this respect also, the rule of the common law is different from that of the maritime law. Under the latter, if both parties have been negligent, but one of them in a greater degree than the other, the loss will be apportioned accordingly. But by the common law, a party who asks damages for a wrong done, must fix the wrong on his adversary. If the parties are both chargeable with negligence, more or less, a court of law will not balance the negligence, to ascertain whether on the one side it was not greater than on the other.

If the collision occurred from the negligence or design of the defendants, and the plaintiffs acted with ordinary caution, they are entitled to recover. Whether negligence on the part of the offending boat, was the result of ignorance or design, it is equally liable. If, indeed, there was an intention proved, by the officers of the *Talma* to run into the *Yorktown*, that, I suppose, would establish their liability, without much inquiry into the conduct of the other party.

On this point, the language of Chief Justice Tindal is, "If the plaintiff contributed in any degree by any want of care or improper conduct to the injury he can not recover," this does not mean that the plaintiff must be entirely faultless. *Rayer v. Mitchell*, 38 Com. L. 254. Tindal, Chief Justice, to the jury—"You must be satisfied that the injury was occasioned by the want of care, or the improper conduct of the defendants; and was not imputable, in any degree, to any want of care, or any improper conduct on the part of plain-

tiffs." Five hundred pounds claimed—jury found two hundred and fifty pounds. Some mistake was alleged. Tindal asked the jury how they had made up their verdict. The foreman answered, that there were faults on both sides. Tindal, then you have considered the whole matter. The foreman replied in the affirmative. Richards then submitted that the verdict should have been for the defendant. Tindal said no. There may be faults to a certain extent." It might appear that the plaintiff, possibly, could have acted more judiciously than he did to avoid the collision after the event has occurred. There is a great difference between the view at the moment of danger, under excitement, and after the event, on looking calmly at the facts. And the law adapts itself to the exigencies of the moment, making some allowance for the infirmity of human judgment—not the infirmity resulting from ignorance, or a nervous excitability, which unfits a man for such an emergency. This is one of the most important qualifications of a pilot. He must stand firmly at the helm, and look on the danger, however imminent, as the best mode of avoiding it.

The highest possible degree of skill is therefore not required in a case like the present, for that is possessed by very few individuals, engaged even in the most hazardous enterprises. But there must be caution and skill, such as every one would be expected to exercise, who takes upon himself the pilotage of a steam vessel.

The attention of the court is called to the Louisiana law, which regulates the navigation of steamboats. This law contains numerous provisions in regard to the inspection of boilers by competent persons, hanging out lights, ringing the bells, stopping the engines and floating, by the downward boat, when within a certain distance of the ascending boat, etc. As a matter of fact, it is known that this law was before Congress, and especially the committee of the House of Representatives who reported the bill to regulate the navigation of steamboats, and it appears on an inspection of both laws,

that parts of the Louisiana act were incorporated into the act of Congress. Such parts, were, no doubt, adopted as Congress deemed judicious, having the subject fully before it. And we are asked to charge the jury that the Louisiana law is binding on the parties before us, and that unless the plaintiffs complied with its requirements, they can not recover.

There can be no doubt that Louisiana has the power to regulate commerce within her limits, where the trip begins and terminates within her jurisdiction. But the voyage of the Yorktown, at the time the collision happened, was from Cincinnati to New Orleans, and the question arises whether the Louisiana law regulates the duties of the officers of the Yorktown under such circumstances. It is admitted that the Talma, having left New Orleans, was proceeding to Louisville, in Kentucky.

The vital importance of this question to western navigation, entitles it to a serious examination. We are aware that there are some minds, who have so long and ardently cherished a jealousy of federal powers, that they deny the existence of such powers when they stand in the way of State authority. They seem to think that our Union is safe only, and the rights of every citizen best secured, by recognizing all power in the States except, not those that have been delegated to the Federal Government, but those which the States, respectively, shall determine belongs to it. This would throw us back on the articles of confederation, an escape from which, by the adoption of the constitution, saved the Union from ruin.

In the 8th section of the 1st article of the constitution, it is declared that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." This power is found in a class of powers conferred by the constitution, every one of which, in its nature and character, is exclusively vested in the Federal Government. Two of them, it has been held, may be exercised by a State, until Congress shall act on the subject;

and the other, it has been decided, may be carried out by a State, in disregard of the action of Congress. The two first include the power to pass a bankrupt law, and to regulate commerce. The other is the power to punish for counterfeiting, or passing the coin of the United States.

The first two are impracticable, as they involve the absurdity of two distinct powers regulating the same thing. This is only obviated by the admission, that the action of Congress necessarily supercedes State action. But this is wholly indefensible. And it is disparaging to State power to say, that any part of it may be abrogated by the action of Congress. It is not the regulation of the subject by Congress which is to annul State action, but the very thing must be regulated by the former, which the latter has acted on; as, for instance, the hanging a light out, at night, on the deck of a steam boat. In other words, that the law of Congress and the law of a State regulating commerce must be compared and considered, as having been passed by the same power, and if they are not identical, the State regulation stands. In this view, Congress, however much they may have considered a regulation similar to the one adopted by the State, can only get rid of it by expressly nullifying it. And when such a game shall commence, we are not wanting in experience to know, that a State, being a smaller body than the Union, will outstrip it.

The other power, to punish for counterfeiting the coin, involves the inconsistency and inconvenience of punishing a counterfeiter twice for the same offense. It is clear that a punishment under a State law for such an offense could not be pleaded in bar to a prosecution under the act of Congress. It would be a singular anomaly in any government, having the power to coin money and regulate the value thereof, if it should look to a distinct government for the protection of this right.

It will be observed that the power to regulate commerce among the several States, is given in the same clause of the constitution, and in the same language, as the power to regu-

late commerce among foreign nations. And the power may be exercised to the same extent, with the few exceptions contained in the constitution.

As the power is "to regulate commerce among the States," no regulation can be made by Congress but such as shall embrace two or more States. The constitution, therefore, did not intend to interfere with a commerce which was limited to a State. But the commerce carried on by both the boats in question, was one among several States, and was, in no sense, limited to the State of Louisiana. In a voyage from Pittsburgh to New Orleans, a steamboat passes within the jurisdiction of ten States, each one having the same power as Louisiana to regulate the commerce which passes through it, or is destined to any of its ports. Concert of action among so many States is not to be expected. Each State following its own notions, in regard to commerce, may make such regulations as it shall deem proper, regarding only its own interests. Collisions, in the nature of things, would arise between different States, as they did under the confederation, and the commerce of the country would be destroyed.

Here are ten different regulations, and how is the steamboat conductor to ascertain when he passes out of one jurisdiction into another? The jurisdiction of each State extends to the middle of the river, and how is a pilot to know, in descending or ascending, to which shore he is the nearest? A stroke of the wheel takes him from one jurisdiction to another. Could any one imagine a system more impracticable than this? If any one were to devise a means for the destruction of commerce, nothing would better secure such an object than this system. Even the steamboat captains are better constitutional lawyers, I fear, than some of our jurists, as they say uniformly, on being asked the question, that they disregarded the Louisiana law, believing the State had no power to pass it. And, gentlemen of the jury, they have no such power. As before remarked, the law is opera-

tive on a commerce that is wholly within the State. But over a vessel which is pursuing a trip from Cincinnati, or Louisville, or Pittsburgh, or any other place out of the State of Louisiana, the law has no operation. And you will regard it as having nothing to do in the regulation of either of the boats in question.

There is a good deal of conflicting testimony in this case, more I think, than I have ever witnessed in any case. You are the exclusive judges of the credibility of witnesses. The facts admitted by all the witnesses may aid you in coming to a satisfactory conclusion. It appears the Yorktown was run into, which could not have been done, if her stern, as one of the witnesses said, was thrown round so as to strike the Talma. Serious injury was done to the Yorktown by the collision, and it would seem, could only have been done by the Talma striking her in the manner stated by a majority of the witnesses. Some allowance should be made for the conflicting statements of witnesses, from the deceptive water view at night, especially in regard to distances. But the remark is made with regret, that this cause can not satisfactorily account for the conflict in some of the statements.

The following instructions were asked in form and exceptions as noted, were taken. And thereupon the plaintiffs claimed the following items of damage of which they offered proof:

1st. For the expenses and delay of the Yorktown at the place of collision, and at New Orleans, her port of destination.

2d. For the expense and delay of taking said Yorktown to Cincinnati, which, it was admitted by the parties to be the most suitable port for making the repairs.

3d. For loss of time in the use of said boat while she was undergoing said repairs, which was proved to be two months.

4th. For the cost of said repairs which were proved to be (3025 07) three thousand and twenty-five dollars and seven cents.

5th. For the diminished value of said boat after she was repaired, from loss of reputation or otherwise.

6th. For interest upon all the items from the time said boat was repaired.

And thereupon, the defendants produced a statute of the State of Louisiana, entitled "An act relative to steam boats," passed March 6th, 1834, a copy of which is hereto annexed, marked A, and made part thereof, by the tenth section of which it is provided as follows:

"That it shall be the duty of the Master and Pilot of a steam boat, when descending any river or stream, in the night, within the limits of this State, when within one mile of an ascending boat, to shut off the steam and ring the bell, and permit the boat to float upon the current of the river until the ascending boat shall have passed, and the master and owner of the ascending boat shall then assume the responsibility of steering clear of the descending boat and be liable in damages to the extent of the injury which shall be sustained."

And thereupon, the defendants requested the court to charge the jury that this act governed the case, and was a bar to any recovery by the plaintiffs; which charge the court refused to give, but did charge that the act was void as a law, for want of power in the Legislature of Louisiana to pass the same, except as to boats exclusively navigating waters within the State of Louisiana, but might be received by the jury as a fact going to show what the said Legislature regarded as prudent navigation.

The defendants also gave in evidence tending to show that the Talma was coming up the river in her right place, near the Louisiana shore, and rang her big engine bell and stopped her engine and commenced backing as soon as a collision was apprehended by her officers, and was in the act of backing when the collision took place, which was somewhere within three hundred yards of the Louisiana shore, the river being

about one mile wide at that place, and adduced the evidence of twenty-five pilots to show that the most prudent and usual course of navigation for the descending boat in the night season, even at the high stage of water which then existed, would have been to descend in the main channel of the river, which at that place was near the Mississippi shore, and more than half a mile from the place of collision, and if there were danger of collision to ring the alarm bell and stop her engines and float, and back her engines when danger became imminent, which course is pursued by many pilots, though not by a majority; the plaintiffs having previously introduced evidence of fifty-five pilots navigating said river, to show that it was the most usual course of navigation at the place of the collision, for descending boats to navigate between one hundred and fifty and three hundred yards from the Louisiana shore, and the ascending boat to navigate from twenty to fifty yards from the Louisiana shore.

And thereupon the counsel for the defendants requested the court further to charge the jury as follows:

1. In order to recover in this case, the plaintiffs must satisfy you that the collision was caused wholly by the fault of the defendants, and that no fault of the plaintiffs contributed thereto.

2. That if it was a case of mere misfortune, or of mixed fault, or of inscrutable fault, the plaintiffs can not recover.

3. The issue to be tried, is negligence or not; and if the negligence of the plaintiffs contributed to the collision, they can not recover.

4. No usage of navigation can sanction a departure from the rules of prudence and safety.

5. The rule of damages, if plaintiffs recover, is the cost of repairs, and the expense of bringing the boat to the place of repairing.

The second, third and fourth of which instructions were given as requested; but the court refused to give the first

charge, and refused to give the fifth charge in the language asked, and charged the jury as follows, in lieu of the first charge asked: That if the plaintiffs were making use of ordinary care and caution, and running according to the most usual course of navigation at that place, although such course might not be the most prudent and safe, in the opinions of some individuals, nor the course pursued by many pilots less than a majority, this was sufficient to entitle them to a verdict, if the jury believed the collision was occasioned by the fault, negligence, or unskillfulness of the defendants' officers navigating the *Talma*. That no usage could be respected in a court of justice, which was not founded on prudential considerations, and such as tended to the safety of navigation. But extreme caution was not required. The plaintiffs must show that they were descending the river in the ordinary course of descending boats, and that they exercised ordinary prudence and skill, under the circumstances, to avoid the collision. That if the *Talma* took a shear across the river, running her bow square into the Yorktown as she was descending the river, and it was not in the power of the helmsman of the *Talma* to prevent such a shear, the fact should be proved in excuse.

And the court charged, in lieu of the fifth instruction asked, that if the plaintiffs recovered at all, they were entitled to recover the five first items above mentioned, except so much of the fifth item as related to loss of reputation; and as to the sixth item—that of interest—the court refused to charge either way, and left it to the discretion of the jury.

To all which refusals to charge, and charges given not according to the request of the defendants, the defendants excepted, and pray the court to sign and seal this their bill of exceptions, which is accordingly done, and ordered to be made a part of the record. Verdict for the plaintiffs.

The judgment in the supreme court was affirmed by a divided court. The division was on the instruction in regard to the Louisiana law.

BARTLETTE v. CRITTENDEN ET AL.

By the common law, a party had a property in his own manuscripts.

And if they be in the possession of other persons, who are about to make an improper use of them, a court of chancery would inhibit such use.

The principles in regard to a manuscript, may be applied to the invention of a machine.

It belongs to the inventor, and it will continue to be his property until he shall give it the public or abandons it.

Under our present law, a use of a machine for less than two years, before the application of a patent shall be made, does not invalidate the right.

A person who uses his own manuscripts for the purpose of instructing others, does not thereby abandon them to the public.

Nor does he abandon them, when his pupils are permitted to take copies.

Such copies being intended for the purpose of instruction, as used, can be applied to no other purpose.

In the use, the intention of the owner of the manuscript can not be perverted or extended.

Mr. *Walker* appeared for the complainant.

Messrs. *Storer* and *Gwynn* for the defendants.

OPINION OF THE COURT.

THIS is an application to enjoin the defendants from printing, publishing, or selling a work denominated "An inductive and practical system of double-entry book-keeping, on an entirely new plan," on the ground that a material part of the manuscript, and the arrangement, were the work of the complainant, and were pirated from him by the defendants.

It appears that the complainant for twelve years has been engaged in teaching the art of book-keeping, in the city of Cincinnati and other places. That he had reduced to writing the system he taught, on separate cards for the convenience of imparting instruction to his pupils; and that he permitted his students to copy these cards, with the view to their own advantage and to enable them to instruct others. That Jonathan Jones, being qualified in the school of the complainant, as a teacher, and having copied the manuscripts of the complainant, engaged, in connection with him, to teach a com-

mercial school in St. Louis. While thus engaged, A. F. Crittenden, one of the defendants, entered the school at St. Louis as a student, and was permitted to copy the manuscripts of the complainant, in the possession of Jones; and from those manuscripts, with certain alterations, he made up the first ninety-two pages of the book, under the above title, which was published in Philadelphia, in connection with his brother, by E. C. & J. Biddle, two of the defendants, in the present year.

The answers of the defendants either deny the allegations of the bill, or do not admit them, and call for proof of the facts stated.

On this motion for an injunction the merits of the case have been discussed, with much research and ability.

This application is made under the 9th section of the act of Congress of the 3d of February, 1831, which provides, that "any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained, etc., shall be liable to suffer and pay to the author or proprietor, all damages occasioned by such injury," etc. And power is given to grant an injunction to restrain the publication.

The first section of the act of the 30th of June, 1834, requires all deeds or instruments in writing for the transfer or assignment of copy-rights, to be acknowledged and recorded.

At common law, independently of the statute, I have no doubt, the author of a manuscript might obtain redress against one who had surreptitiously got possession of it. And on general equitable principles, I see no objection to relief being also given, under like circumstances, by a court of chancery. But this is a proceeding under the statute.

The defendants contend that the complainant, by suffering copies of his manuscripts to be taken, abandoned them to the public.

The principle is the same, it is alleged, in regard to copy rights and patents. And that a consent or permission of the author to use the manuscripts, is as fatal to his exclusive right, as the consent of the inventor to use the thing invented. *Rundell v. Murray*, 3 Mylne & Craig, 711, 728, 730, 735; *Miller v. Taylor*, 4 Burr. 186; *Barfield v. Nicholson*, 2 Sim. & Stuart, 1. To show the analogy between copy-right and patents, the defendants cited *Whittemore v. Carter*, 1 Gallison, 478; *Miller v. Sillabee*, 4 Mason, 108, in which the question considered was, did the inventor suffer the thing patented to go into public use without objection. *Walcot v. Walker*, 7 Ves. 1; *Platt v. Button*, 19, Ib., 448; 1 Story's Rep. 282, *Wythe, et al. v. Stone, et al.*

The 7th section of the act of the 3d of March, 1839, declares that a purchaser from the inventor of the thing invented, before a patent is obtained, shall continue to enjoy the same right after the obtainment of the patent as before it; and that such sale shall not invalidate the patent, unless there has been an abandonment, or the purchase has been made more than two years before the application for the patent.

Before this act, a sale of the right would have been an abandonment to the public by the inventor. The decisions, therefore, referred to, do not apply to cases arising under this statute. A sale of the right is not an abandonment, if made within two years before the application for a patent, as the law now stands; and it may be a matter of some difficulty, within the above limitation of two years, to determine what act shall amount to an abandonment. Where the act is accompanied by a declaration, to that effect, there can be no doubt; but if a sale be not an abandonment, a mere acquiescence in the use of the invention would seem not to be. Within the two years, to constitute an abandonment, the intention to do so must be expressed or necessarily implied from the facts and circumstances of the case. It is a question

of intention, as to the extent of the license, of which we must judge, as we are called to do in other cases. But the limitation of two years does not apply in this case, should a copy-right be considered in principle identical with an invention of a machine, as more than two years have elapsed since copies of the complainant's manuscripts were taken with his consent. The question arises upon the facts stated, and must be decided on general principles.

In the first place, there was no consent of the complainant, that his manuscripts should be printed. That they were not prepared for the press is admitted. They were without index or preface, although, as alleged, they may have contained the substantial parts of the complainant's system, which, in due time, he intended to print. Copies of the manuscripts were taken for the benefit of his pupils, and to enable them to teach others. This, from the facts and circumstances of the case, seems to have been the extent of the complainant's consent.

It is contended that this is an abandonment to the public, and is as much a publication as printing the manuscripts. That printing is only one mode of publication, which may be done as well by multiplying manuscript copies. This is not denied, but the inquiry is, does such a publication constitute an abandonment. The complainant is no doubt bound by this consent, and no court can afford him any aid in modifying or withdrawing it. The students of Bartlette, who made these copies, have a right to them and to their use as originally intended. But they have no right to a use which was not in the contemplation of the complainant and of themselves, when the consent was first given. Nor can they, by suffering others to copy the manuscripts, give a greater license than was vested in themselves.

In England, if an invention be pirated and given to the public, it prevents an inventor from obtaining a patent. But this is not the construction of our laws. If an inventor of a

machine sell it or acquiesces in its public use, not within the limitation of the two years, he forfeits his rights. He must be diligent in making known and asserting his right, where it has surreptitiously got into the possession of another, or he abandons it. This was the settled rule before the act of 1839, and it would seem that cases which do not come within the provisions of that act, must be governed by the old rule.

No length of time, where the invention does not go into public use, can invalidate the right of the inventor. He may take his own time to perfect his discovery, and apply for a patent. And the same principle applies to the manuscripts of an author. If he permit copies to be taken for the gratification of his friends, he does not authorize those friends to print them for general use. This is the author's right, from which arise the high motive of pecuniary profit and literary reputation. When the inventor consents to the construction and use of his machine, he yields the whole value of his invention. But an author's manuscripts are very different from a machine. As manuscripts, in modern times, they are not and can not be of general use. Popular lectures may be taken down *verbatim*, and the person taking them down has a right to their use. He may in this way perpetuate the instruction he receives, but he may not print them. The lecturer designed to instruct his hearers, and not the public at large. Any use, therefore, of the lectures, which should operate injuriously to the lecturer, would be a fraud upon him for which the law would give him redress. He can not claim a vested right in the ideas he communicates, but the words and sentences in which they are clothed belong to him.

It is contended that the manuscripts are incomplete, and if published in their present state, could not be protected by a copy-right. That an unfinished manuscript or book, which gives only a part of the thing intended to be written or published, can be of no value, and if printed no relief could be

given, as no damage would be done. That the parts of a machine, in the process of construction, if pirated, would give no right to an injunction by the inventor.

If the manuscript or machine referred to consisted of a mere fragment, which embodied no principle and pointed to no design, the piracy of it would afford no ground of relief. But such is not the character of complainant's manuscripts. They may not be complete for publication. Some explanatory notes may be wanting, to assist the reader in comprehending the system. This information was communicated by lectures, and for the purposes of instruction in that mode, the notes were unnecessary. But the cards contain the frame work of the system. The substratum is there, and so exemplified as to show the principle upon which it is constructed. That it was valuable, is shown, from the fact of the cards having been used by the defendants in teaching the system, and in publishing them as they have done.

The facts show the piracy beyond all doubt. And that it was done under circumstances which admit of little or no mitigation. The cards, as they well knew, had been, for a number of years, and were then being used by the complainant to instruct pupils. They had learned all they knew on the subject from the complainant. They probably knew that he intended to publish his plan. But this would, to some extent, at least, supersede the necessity of personal instruction. In disregard of these considerations, and of the obligations the defendants owed to the complainant, the publication was made.

The court will allow an injunction unless a satisfactory arrangement shall be made between the parties.

STORY'S EXECUTORS v. HOLCOMBE, ET AL.

Every abridgment of a work, however fair, does more or less affect the sale of the original work.

The theory that such a work adds to the value of the original work, by making it more extensively known, is unfounded in fact. A copyright of an author should be protected by the same rule that applies to a patented machine.

Any machine, however differently constructed, which acts upon the same principle, violates the patent.

A fair abridgment contains the principle of the original work. A compiler or reviewer can not extract from an author so as to convey the same knowledge as the original book.

There is a clear distinction between an abridgment and a compilation. The abridgment necessarily adopts the same arrangement, and conveys the same knowledge in a condensed form.

A compiler can neither adopt the arrangement, nor convey by his extracts the same knowledge.

A fair abridgment, though it injure the sale of the original book, is lawful.

The same effect, by a compiler, renders his work unlawful.

The intent with which extracts are made, can be of little or no importance.

A part of a book may be an infringement, and the other parts not.

In such a case the relief will only extend to the part considered to be an infringement.

Messrs. *Walker* and *J. C. Wright* for complainants.

Messrs. *Gholson* and *Holcombe* for defendants.

OPINION OF THE COURT.

THE plaintiffs in this case complain that the defendants, in printing and publishing, "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries, etc., by James P. Holcombe," have infringed the copy right in Judge Story's "Commentaries on Equity Jurisprudence," and they pray that the defendants may be enjoined," etc.

The defense set up is, that the work complained of is a *bona fide* abridgment of the Commentaries.

The special Master, to whom both works were referred, reports, that "the chapters and the subjects are the same in both."

He states that the "Equity Jurisprudence" of Judge Story contains one thousand eight hundred and fifty-six octavo pages, including notes; and that the "Introduction to Equity," by Mr. Holcombe, contains three hundred and forty eight octavo pages, including notes:" That "a page in Holcombe contains a little more than one of Story; that, reduced to the same sized page, the ratio in the amount of matter in Holcombe's book to that of Story, is about in the relation of two to nine; that, in the entire work of Story, there are two hundred and twenty-six pages, constituting nearly an eighth part, on which there is some matter which has been extracted in the same language, or very nearly so, into the book of Mr. Holcombe. This matter comprises eight hundred and seventy-nine lines of Mr. Holcombe's book, which is about equivalent to twenty-four pages of Holcombe and thirty of Story, which makes one-fifteenth part of Holcomb and one-sixtieth of Story. This matter is found in scattered paragraphs in the first third of Holcombe's book." And the Master states, that "all the other portions of the 'Equity Jurisprudence' of Judge Story have been abridged by Mr. Holcombe without any transcription of the common language or words of Story. The part so abridged by Holcombe comprehends two-thirds of his book."

The first hundred pages of Mr. Holcombe's book, which comprises ten chapters, contain about two thousand lines, exclusive of notes, about nine hundred of which are copied from Judge Story's Commentaries. From the succeeding chapters of Story, Mr. Holcombe has copied certain passages; but generally he has abridged the matter so as to reduce it, in his own language, to a small space. Very few, if any of the notes are taken from Story.

After a very able and laborious examination of the two works, the special Master comes to the conclusion that there is no infringement; but that the work of Holcombe is a fair abridgment of the Commentaries of Judge Story.

It was agreed that the cause should be argued and decided on its merits, and not on exceptions to the report of the Master.

This controversy has caused me great anxiety and embarrassment. On the subject of copyright, there is a painful uncertainty in the authorities; and indeed there is an inconsistency in some of them. That the complainants are entitled to the copyright which they assert in their bill, is not controverted by the defendants. The decision must turn on the question of abridgment.

If this were an open question, I should feel little difficulty in determining it. An abridgment should contain an epitome of the work abridged—the principles, in a condensed form of the original book. Now it would be difficult to maintain that such a work did not affect the sale of the book abridged. The argument that the abridgment is suited to a different class of readers, by its cheapness, and will be purchased on that account by persons unable and unwilling to purchase the work at large, is not satisfactory. This to some extent may be true; but are there not many who are able to buy the original work, that will be satisfied with the abridgment? What law library does not contain abridgments and digests, from Viners and Comyns down to the latest publications. The multiplication of law reports and elementary treatises, creates a demand for abridgments and digests; and these being obtained, if they do not generally, they do frequently prevent the purchase of the works at large. The reasoning on which the right to abridge is founded, therefore, seems to me to be false in fact. It does, to some extent in all cases, and not unfrequently to a great extent, impair the rights of the author—a right secured by law.

The same rule of decision should be applied to a copyright as to a patent for a machine. The construction of any other machine which acts upon the same principle, however its structure may be varied, is an infringement on the patent.

The second machine may be recommended by its simplicity and cheapness; still, if it act upon the same principle of the one first patented, the patent is violated. Now an abridgment, if fairly made, contains the principle of the original work, and this constitutes its value. Why, then, in reason and justice, should not the same principle be applied in a case of copyright as in that of a patented machine? With the assent of the patentee, a machine acting upon the same principle, but of less expensive structure than the one patented, may be built: and so a book may be abridged by the author, or with his consent, should a cheaper work be wanted by the public. This, in my judgment, is the ground on which the rights of the author should be considered.

But a contrary doctrine has been long established in England, under the statute of Anne, which, in this respect, is similar to our own statute; and in this country the same doctrine has prevailed. I am, therefore, bound by precedent; and I yield to it in this instance, more as a principle of law, than a rule of reason or justice.

The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that in which its chief value consists. This may be done to a reasonable extent by a reviewer, whose object is to show the merit or demerit of the work. But this privilege can not be so exercised as to supersede the original book. *Bromhall v. Holcombe*, 3 Mylne & Craig 337; *Folsom v. Marsh*, 2 Story 116.

In the language of Godson 352, "the extracts must not be made too freely. Sufficient may be taken to form a correct idea of the whole; but no one is allowed, under the pretense of quoting, to publish either the whole or the principal part of another man's composition; and therefore a review must not serve as a substitute for the book reviewed. If so much be extracted, that the article communicates the same knowl-

edge as the original work, it is an actionable violation of literary property. *Wilkins v. Aikin*, 17 Ves. 422; *Rowarth v. Wilkes*, 1 Camp. 97.

In *Folsom, et al. v. Marsh, et al.*, 2 Story 106, it is said: "No one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passage for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." This doctrine seems to consider the intention with which the citations are made as necessary to an infringement. In *Cary v. Kearsley*, 5 Esp. N. P. c. 170, Lord Ellenborough takes the same view. But I can not perceive how the intention with which extracts were made, can bear upon the question. The inquiry is, what effect must the extracts have upon the original work. If they render it less valuable by superseding its use, in any degree, the right of the author is infringed: and it can be of no importance to know with what intent this was done. Extracts, made for the purpose of a review, or a compilation, are governed by the same rule. In neither case can they be extended so as to convey the same knowledge as the original work.

But the great question in the case is, whether the book of Mr. Holcombe is a fair abridgement of that of Judge Story.

The word abridged means "to epitomize," "to reduce," "to contract." In *Strahan v. Newberry*, 10 L. J. Rep. 775, Chancellor Apsley said, "to constitute a true and proper abridgment of a work, the whole amount must be preserved in its sense, and then the act of abridgment is an act of the understanding, employed in carrying a larger work into a smaller compass." In this view Mr. Justice Blackstone concurred, who seems to have been consulted by the Chancellor. Mr. Justice Story says, in *Folsom v. Marsh*, 2 Story Rep.

106-7: "So it has been decided, that a fair and *bona fide* abridgment of an original work, is not a piracy of the copy-right of the author; but then, what constitutes a fair and *bona fide* abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can arise for judicial discussion. It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts, constituting the chief value of the original work."

In *Gyles v. Wilcox*, 2 Atk. 143, Lord Hardwick said, "where books are colorably shortened only, they are undoubtedly within the meaning of the act of Parliament, and are a mere evasion of the statute, and can not be called an abridgment."

A fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment. It is only new in the sense that the view of the author is given in a condensed form. Such a work must not only contain the arrangement of the book abridged, but the ideas must be taken from its pages.

It must be in good faith an abridgment, and not a treatise, interlarded with citations. To copy certain passages from a book, omitting others, is in no just sense an abridgment of it. It makes the work shorter, but it does not abridge it. The judgment is not exercised in condensing the views of the author. His language is copied, not condensed; and the views of the writer, in this mode, can be but partially given. To abridge is to preserve the substance, the essence of the work, in language suited to such a purpose. Gould's Abridgment of Allison's History of Europe gives all the material facts of the original work, covering the whole line of the

narrative: and this, in a legal sense, may be called an abridgment.

In the argument it was insisted, that an elementary work is not a proper subject for abridgment. There may be works which are not susceptible of this process. Treatises on the exact sciences may constitute an exception; but works on law, elementary or otherwise, are not within the exception. Hale's Pleas of the Crown, Blackstone's Commentaries, and Kent's, have been abridged, and other works of a similar character. What is the character of the work complained of? Upon its title-page it does not purport to be an abridgment, but "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries;" and in the preface the author says, "it is not intended to supply the place of the Commentaries, with any class of readers, but to serve simply as an introduction, a companion and a supplement to their study. The text is substantially an abridgment of that work. The same general plan and arrangement has been pursued, and the elementary principles which are supposed to possess most practical value, selected and presented, with appropriate illustrations, in a greatly condensed form. The author has felt at liberty to make very considerable alterations and additions, (entirely, however, of an elementary character,) believing that this course would not diminish, but increase the adaptation of his own work, to be a companion to the study of the commentaries."

If this book were intended to be a mere abridgment of the Commentaries, the fact is not indicated in the title. Within my knowledge no abridgment has been made of any book which has not been so entitled. An Introduction may be an exordium, a preface, or the preliminary part of a book; but it is not an abridgment. The author says "the text is substantially an abridgment of the Commentaries;" but he also says, that "he has felt at liberty to make very considerable alterations and additions." Alterations of the original work,

and additions to the text, are not appropriate to an abridgment. In saying, therefore, that "the text is substantially an abridgment," Mr. Holcombe could have meant nothing more than that, in writing his book, he followed the arrangement of the Commentaries, extracting certain parts, condensing others, with "very considerable alterations and additions" of his own. A supplement to the Commentaries, which Mr. Holcombe says, in some sense is the character of his work, may supply defects in the original; but it can in no sense be considered an abridgment. This remark seems to have been made in reference to the notes added by the author.

It may not be essential to exclude extracts entirely from an abridgment; but in making extracts merely, there is no condensation of the language of the author, and consequently there is no abridgment of it. Much looseness is found in the decisions upon this subject. Some of the judges would seem to consider, that where a book is greatly reduced in its size, though made up principally of extracts, it is an abridgment. In a book of Reports, such as "Bacon's Abridgment," the language of the court is necessarily adopted often to show the principle of the decision. But the same necessity does not exist, and the same license can not be exercised in abridging an elementary work. In the case of the assignees of *Johnson v. Kennedy*, 1 Amb. 402, it was held, that abstracts made from a tale written by Johnson, called the "Prince of Abyssinia," did not infringe the copyright; but that decision was much influenced by the fact, that the author himself had published similar abstracts in a periodical paper. In *Emerson v. Davies*, 3 Story 795, Judge Story says: "To amount to an infringement, it is not necessary that there should be a complete copy or imitation in use throughout; but only that there should be an important and valuable portion which operates injuriously to the copyright of the plaintiff."

All the authorities agree that to abridge requires the exercise of the mind, and that it is not copying. To compile is

to copy from various authors into one work. In this the judgment may be said to be exercised to some extent in selecting and combining the extracts. Such a work entitles the compiler, under the statute, to a right of property. This right may be compared to that of a patentee, who, by a combination of known mechanical structures, has produced a new result.

Between a compilation and an abridgment, there is a clear distinction; and yet it does not seem to have been drawn in any opinion cited. A compilation consists of selected extracts from different authors: an abridgment is a condensation of the views of the author. The former can not be extended so as to convey the same knowledge as the original work: the latter contains an epitome of the work abridged and consequently conveys substantially the same knowledge. The former can not adopt the arrangement of the works cited; the latter must adopt the arrangement of the work abridged. The former infringes the copyright, if matter transcribed, when published, shall impair the value of the original book: a fair abridgment, though it may injure the original, is lawful. 1 Brown Ch. R. 451; *Gyles v. Wilcox*, 2 Atk. 141.

There is, then, a right which the abridger may exercise, far beyond that of a mere compiler. His labor is of a different kind, and of a higher order. It is therefore important that the works of these two characters should not be so blended as to place them upon the same footing: and yet in many of the decisions, no distinction is made between them. The same facts and reasoning are applied indiscriminately to both cases; and not unfrequently there is a confusion in the argument, which tends more to perplex than to enlighten the reader.

In the case of *Folsom v. Marsh*, above cited, Mr. Justice Story says: "It seems to me, therefore, that is a clear invasion of the right of property of the plaintiffs, if the copying of parts of a work, not constituting a major part, can ever be a violation thereof; as, upon principle and authority, I have

no doubt it may be. If it had been the case of a *bona fide* abridgment of the work of the plaintiffs, it might have admitted of a very different consideration."

It is said that in many parts of the Commentaries there are citations from other works. This is true. And who could write a book entirely new upon jurisprudence? Principles, not familiar to the profession, could be of little value and of no authority. No author, by copying from others, can withdraw from general use, that which has been given to the public. Judge Story did not intend his book to be an abridgment, but a treatise on jurisprudence; and the approbation of this work by the profession, in this country and in England, is high evidence of its merit, and of the great learning and ability of the author.

Whatever doubts may have been formerly entertained, it is now clear, that a book may, in one part of it, infringe the copyright of another book, and in other parts be no infringement; and in such a case, the remedy will not be extended beyond the injury. Lord Hardwicke once laid down a doctrine contrary to this; but that opinion has been overruled by subsequent decisions.

Nearly one half of the text, in the first hundred pages of Mr. Holcombe's book, appears to have been extracted from Story. That this was done by him under a conviction that he was exercising a common right, no one acquainted with his legal talent and honorable bearing, can doubt. But these constitute no criterion for the decision of the case. That the view of Mr. Holcombe in this respect, is not without a seeming sanction, in the opinion of some judges, is admitted.

To class these extracts under the head of "abridgment," would seem to be a perversion of terms. Whatever else this part of Mr. Holcombe's book may be called, it is not an abridgment. With greater propriety it may be called a compilation, as the extracts contained in it are taken from various authors. As a compilation, this part of the book must

be considered an infringement of the right of the plaintiffs, by the copious extracts made from the Commentaries, and the classification of the subjects copied from them.

So far as citations are made in the Commentaries, Mr. Holcombe had a right to go to the original works, and copy from them; but he could not avail himself of the labor of Judge Story, by copying the extracts as compiled by him. This is a well established principle. Nor could he copy the plan or arrangement of the subjects in the Commentaries. It is said there can be no copyright in a plan, distinct from the work itself, any more than there can be a copyright in an idea. This is admitted: but the words in which an idea is expressed, is a subject of property; and so is the classification of the subject discussed.

Looking at the smallness of Mr. Holcombe's book, in comparison of that from which it was principally taken, one might suppose that the former was a short abridgment of the latter. But this comparison of size or number of pages, affords no guide to a proper decision. The character of the work must depend upon its matter: and it would seem from the considerations stated, that the first third part of Mr. Holcombe's book, including one hundred pages, can not be justly and legally called an abridgment, as it does not possess the essential ingredients of such a work; and that, viewing it as a compilation, it is an infringement of the plaintiffs' right, on the ground that the plan of the Commentaries is copied; and also for the reason that the extracts extend beyond the proper limit for such a work. The remaining two thirds of the book may be comprehended under a liberal construction of an abridgment. The matter is greatly condensed by Mr. Holcombe in his own language, and in a manner highly creditable to him.

The prayer of the bill as to the first hundred pages, is granted,

I have been brought to this result reluctantly, being sensible

that the motives of Mr. Holcombe were honorable, and that there was no intention on his part, unjustifiably, to appropriate the labors of judge Story to his own advantage. In this view, I can not refrain from saying, that an adjustment of the controversy by the parties themselves, would be extremely gratifying to me; and, from my intimate knowledge of the eminent qualities of my lamented brother, and I will add, of his unbounded respect for talent and high character, that I can not be mistaken in saying, if he were living, an amicable adjustment would be most gratifying to him.

UNITED STATES v. JOEL W. CRANE.

When an individual is charged as accessory, he may, under the statute be tried and convicted, if the principal can not be found.

But when the principal has been tried and acquitted, on the charges, on which another is indicted as accessory, the person charged as accessory will be discharged on motion.

Mr. *Bartley*, District Attorney.

Messrs. *Ewing* and *Swayne* for defendant.

OPINION OF THE COURT.

THE defendant is indicted, as accessory under the 25 sec. of the Post Office act, which declares, "that if any person shall buy, receive or conceal, or aid in buying, receiving or concealing any article mentioned in the 21 sec. of the act, knowing the same to have been stolen from the mail of the United States, shall be punished on conviction, etc. And such person so offending, may be tried and convicted without the principal offender being first tried, provided he has fled from justice and can not be put upon his trial."

The principal offender was convicted on the first, second and fifth counts of the indictments found against him.

"The first count charged him with stealing the mail; the

second count contained the same charge, somewhat varied, and the fifth count charged the defendant with stealing the mail containing sundry letters and packets."

The incictment against Pettis, the principal, contained six counts, and the jury found him guilty on three counts and not guilty on the other three.

In the third count he was charged with stealing the mail, containing fifty letters. The fourth charged him with stealing the mail containing sundry articles of great value, to wit, of the value of five hundred dollars, the particular description of which, being to the jurors unknown. Also containing sundry bank notes of great value, being to the jurors unknown. Also containing sundry bank notes of great value, to wit, of the value of five hundred dollars, the particular description of which being to the jurors unknown. Also containing bank notes specified of the value of thirty-five dollars. The sixth count charged him with ripping, cutting, etc., the mail bag.

There are three counts against the defendant as accessory. The first count is abandoned. The second count charges that Pettis stole the mail of the United States of great value, to wit, of the value of five thousand dollars; and that the defendant Crane then and there well knowing, that the said Pettis had stolen the said mail as aforesaid, did knowingly and feloniously afford and furnish comfort and assistance to the said Pettis, by keeping and secreting the said last mentioned money for the said Pettis, etc.

The third count charges Pettis with stealing the mail, of the value of five hundred dollars and containing letters inclosing a large quantity of bank notes, to wit, five thousand dollars which were received and secreted by the defendant Crane.

A motion is made to discharge the defendant on the ground that Pettis, his principal, was found not guilty on the counts against him for stealing the mail containing bank notes, etc.

1. There seems to be no objection against hearing this mo-

tion, as it presents only a question of law arising from facts of record.

2. The offense charged against Crane is under the statute; but it is governed by the same principles as the offense at common law, except that if the principal can not be found, the accessory may be convicted.

3. If the principal be acquitted, the accessory must be discharged.

4. The principal must be convicted, if found, of the thing which the accessory is charged with concealing.

5. If the accessory be charged with stealing bank notes, the principal must be convicted of stealing, from the mail, bank notes.

6. It is not sufficient to show, that he did in fact steal them, but, if found, he must be convicted of stealing them, before the accessory can be punished. 1 Chitty Cr. Law 218; Hale's Pleas of the cr. 623.

The defendant is discharged.

CALVIN W. HOWE v. WADE ET AL.

Notes given in Illinois for collection, the proceeds to be applied to the payment of a debt in New York, which notes from the usage and condition of the country, could only be collected in Illinois currency, which was greatly below par in New York; although no special arrangement was made on the subject, the New York creditor is not bound to receive the Illinois notes, but may require the payment to be made in New York in par funds.

And the agent who made the collections will be allowed his reasonable expenses where suits were brought, commission and the rate of exchange. The agent was one of the New York creditors who were to receive the money collected in proportion to the amount of their claims, but acting as agent for the other New York creditors he is competent, as their agent, to prove the payments to them, under the contract.

Mr. Chase for plaintiff.

Mr. Fox for defendants.

OPINION OF THE COURT.

THIS is a motion for a new trial on two grounds.

1. The verdict is against evidence.

2. The court erred in admitting Fisher Howe to testify as a witness.

From the evidence it appears that on the 5th of October, 1838, the defendants were indebted to Howe & Co., and the other parties named, in the sum of \$4,275 22, and that on the same day Calvin Howe & Co. had in their possession funds consisting of promissory notes belonging to defendants amounting to the sum of \$4060, showing a balance due of \$215 22 to which if interest be added of \$90 39 will make the entire balance due \$305 61. At the last term there was a verdict in favor of Kingsland for \$386 58, which being added to the verdict in Howe would make the sum of \$770. This is 25½ per cent. on the whole amount of the two drafts of Howe & Co., and Kingsland & Company; and it is argued that this is claimed to be occasioned by the difference in exchange, there being no evidence of such difference, and for fees and commissions, without any evidence of payment of commissions, or evidence showing what would be a fair charge for commissions, and it is claimed that no exchange can be recovered unless there was an express contract to cover it.

It must be observed that the securities placed in the hands of Howe & Co., to pay the debts of Howe & Co., and others, all of whom resided in New York, where the debts were contracted and made payable, as of course, consisted of notes of hand on persons in Illinois. Several of these notes could not be recovered by reason of the insolvency of the promisors, and in the collection of others, by suit, expense was incurred. The currency of Illinois only could be obtained on these debts, and the money so soon as it was received entitled the defendants to a credit. And the question, is, whether the currency

of Illinois, so received, shall be credited at par on the New York debts. The defendants did not insist or intimate to their agents, Howe & Co., that they should receive nothing but specie or its equivalent, and it was notorious that debts could not be collected in Illinois, in that manner. It was presumed, therefore, that in the collection of the debts by Howe & Co., the currency of the country should be received in payment, as was customary, and they could not expect that such funds would be received at par in the discharge of the New York city debts. So far as these payments are concerned, there must be an allowance of the rate of exchange between Illinois and New York, and as regards the expense of collecting the money, the expense incurred by the employment of counsel, and the payment of costs, by the agents, Howe & Co., there must also be a charge against the defendants, and also, what shall be a reasonable commission for transacting the business. The notes were not received as money, and they were to be collected by the agents, and the proceeds applied in discharge of the sum due the defendants' creditors in New York. In this view, the above allowances for expenses, exchange and commission, are proper and equitable. And, without deciding in regard to the right of an allowance for exchange in the amount of the judgment recovered, as the balance due, it may be proper to remark that there was no satisfactory evidence before the jury as to the amount of the exchange and commissions and expenses paid, so that on this ground the verdict will be set aside, which will afford an opportunity to procure evidence on these points. The principle on which exchange is allowed is considered in 1 McLean's Rep. 428.

As the decision of the motion is made on the first ground, it is not necessary to consider the second ground, founded upon the error of the court in admitting Fisher Howe to be sworn as a witness, who, it is claimed, was interested in the case.

To understand the application of the objection, the following facts must be stated:

Howe & Co., composed of Calvin W. Howe, the plaintiff, and Fisher Howe, the witness, being partners, sold a bill of goods to Lowry, Wade & Co., and took their note, which is now sued on. In 1887, Lowry, Wade & Co., pledged with the plaintiff and witness, notes amounting to \$4000, the amount to be distributed when collected among the following creditors, *pro rata*, to wit: To C. Howe & Co., \$2289 50; Kelly & Co., \$853 19; Kingsland & Co., \$1049 72; to another person, \$808 34.

The creditors in New York made Howe & Co. their agents to arrange their debts in the best manner that could be done with the firm, in Illinois. And Lowry, Wade & Co., made their arrangement with Fisher Howe, under the authority given to Howe & Co. Upward of three thousand dollars were collected in Illinois paper. There was no dispute as to this amount. The controversy was, as to the allowance of exchange, expense of collections in Illinois, and a commission, etc., and the payment to the other New York creditors a rateable proportion of the money received. To prove this payment to the other creditors in New York, Fisher Howe was introduced as a witness. He was objected to, on the ground that he was interested, in being liable jointly with Calvin Howe, his partner, for the payment over of the money received to the other creditors in New York. Before the trial, it appeared that Fisher Howe had dissolved partnership with his brother, and had no further interest in the partnership concern. At this time Fisher Howe assigned one of the notes given by Lowry, Wade & Co., for the payment of the debts due in New York, the other note having been discharged, and Calvin Howe agreed to pay all costs in the controversy with the Illinois firm; and the question is, whether Fisher Howe is an interested witness.

As the agent of the creditors and of the debtors, he is a

competent witness, unless he be excluded on account of interest in the demand of Calvin Howe & Co., etc.

It is argued, that the witness is responsible with Calvin Howe, his late partner, for the whole amount collected, and the object is to prove by him the payment over to the other New York creditors, a due proportion of the money received. It must be observed, that Fisher Howe acted, in the collection of the money, as the agent of the New York creditors; is he not, therefore, a competent witness to prove the payment of their due proportion of the money collected? Could not Lowry & Co., call him as a witness for this purpose; and was not a payment to Fisher a payment to his principals in New York? And the necessity for this kind of evidence arises from the defense set up by the defendants, that they have paid to Fisher Howe a greater sum than will cover the debt due to Howe & Co. If Fisher Howe, therefore, would be a competent witness to prove these payments in behalf of the defendants, is he not equally competent in this case to establish the same facts? He swears to nothing which can, by any possibility, be given in evidence in his favor hereafter.

The counsel for the defendants refer to the case of *Marshall*, for the use of *Kearney & Thraillills*, Executors, 12 Ohio Rep. 275; in which case one of the makers was offered as a witness by the plaintiff, merely to prove the hand writing of the maker, and it was decided in Bank that he was incompetent. And again, in *Armstrong et al. v. Deshler*, 12 Ohio, 475, the suit was brought on a note signed by several. Lyon, one of the defendants, living in Missouri, was returned not found, and was proved to be insolvent. His co-defendants released him from all contribution, and deposited one hundred dollars with the clerk to cover costs. But the court held, that he, on being offered as a witness to prove the note was usurious, was an incompetent witness, because the plaintiffs had a right to look to the witness for

their whole claim, and that the defendants could not release him from liability.

This decision was undoubtedly correct; and the witness might have been excluded on another ground, not sanctioned by some courts, but which is an established rule of decision in the Supreme Court of the United States, that no individual, whose name appears as maker or indorser upon a bill or note, shall be competent to show that it was obtained illegally or given for an unlawful consideration: But that case is not analogous to the point we are considering. Fisher Howe was only liable to the other New York creditors as their agent, and being so liable, does not exclude him from being a witness to prove that he paid the money to them, in a suit between them and the Illinois firm.

"An indorser who, as agent, had received money from the acceptor to pay the bill, was a competent witness for the acceptor, in an action against him by a subsequent indorser to prove payment of the bill; for, otherwise the rule would have excluded every witness who had paid money as agent." *Bevy v. Packwood*, 7 Adol. & Ellis, 917.

It will be observed that Fisher Howe was offered to prove, that in discharge of his duties as agent, he had paid to the creditors their proportion of the money received by him, which does not come within the case first cited from 12 Ohio. Whether he would be a competent witness to prove the amount of commissions he was entitled to, is a different question. He was not examined on that point. We think he was a competent witness to prove the fact for which he was called. A new trial is granted at the costs of the defendants.

At a subsequent term the cause was submitted to the court by the counsel, and the court, from evidence, fixed the rate of exchange, commissions, and amount of expense.

FRANCIS BURRITT'S SURVIVORS v. RENCH ET AL.

N. P. Iglehart became the agent of the defendants, who constituted a transportation company from Cincinnati, by the canal and lake to New York. He afterward associated with him his brother, and the business was done in the name of N. P. Iglehart & Co.; held, that the transportation company, having recognized the agency of the firm, by correspondence and otherwise, are bound by its acts.

The plaintiffs as consignees, having made advances to the consignor, have a paramount lien upon the goods for the advances.

The consignor has no right to stop them in transitu, or to divert them in any manner.

The defendants, as carriers, are bound for the safe delivery of the goods, in quantity and condition as shipped.

A part of the goods were not delivered, another part was delivered in a damaged state—held, that the defendants were liable to the plaintiffs, to the full value of the goods, in a sound state in New York; and that to the extent of the advances made, they could recover damages on this principle.

Messrs. *King* and *Anderson* for plaintiffs.

Messrs. *Fox* and *Walker* for defendants.

OPINION OF THE COURT.

THIS action is brought to recover damages as consignees, against the defendants, who constitute a transportation company from Cincinnati to Toledo, and thence to New York, on account of a shipment of certain articles specified in the bill of lading, some of which were not delivered, and others were damaged. The jury being sworn, the evidence was introduced.

Authority was given by the defendants to N. P. Iglehart, to receipt for produce and freight generally, from Cincinnati to the eastern cities, by the way of the Miami canal to Toledo, and by Lake Erie, or intermediate ports, at such rates as he might deem best for their interests, and generally to do and act for the interest of the lines.

The power was given to N. P. Iglehart, he doing business at that time on his own account; subsequently he formed a partnership which constituted the firm of N. P. Iglehart and company, who continued to receipt for the line, and forward,

and who, in their firm capacity, corresponded with the owners of said line, and to whom all letters from said line were addressed.

The bill of lading specified to Toledo, and to re-ship for New York, etc., to be delivered in good order at the port of New York, and to Burritt & Johnston, at the rate of 29 cents per hundred for hemp, and 28 cents per hundred on rope, to Toledo. The rates from Toledo to New York to be fixed by Cobb & Co., owners of the line from Toledo to New York city. There were shipped seventy bales of hemp, and three hundred coils of rope, signed N. P. Iglehart & Co., and dated 2d October, 1845. Advertisements were given in evidence by the company, stating the terms of transportation on the whole line, etc.

Thirty-one bales of hemp were received, and three hundred coils of rope. Fifty-five coils of the rope were damaged. In November, 1845, such hemp was worth \$120 per ton; the rope was worth from 5½ to 5¼ per pound. The hemp was injured. The carriers refused to deliver the property until they received payment of the freight.

In accordance with the well-established custom in such cases, the hemp was sold at auction for \$245 95, after paying charges, which amounted to the sum of \$329 45. The damaged rope sold for \$110, after paying charges. Advances were made by the plaintiffs to Salsbury, the consignee, which are still unpaid.

On the 20th of October, 1845, Cobb & Co. shipped, on account of Salsbury, to the care of Burritt & Johnston, New York, forty-nine bales of the said hemp. On the 15th of May, 1846, shipped twenty-eight bales of hemp on account of Salsbury, to Everette & Battell, by Salsbury's order. 19th July, 1846, the transportation company paid to Salsbury, at Buffalo, \$100 in full, on compromise for damages and delays on hemp, etc.

Objection is made to the authority of N. P. Iglehart &

Company, as it appears that the written authority was given only to N. P. Iglehart; and, it is contended, that did not authorize Iglehart to associate with him in the discharge of the duties of his agency, other persons not known to the defendants, and in whom they could have reposed no confidence: that the duty of receiving and forwarding freight, to bind the transportation company, must be performed within the written power. There would be great force in this objection, if the company had not, by correspondence and acts, recognized N. P. Iglehart & Co., as their agents. This having been done by the company, is a sufficient recognition of the agency of Iglehart & Company's acts, which are appropriate and necessary in the performance of their agency. A general recognition of such an agency, which leads the public to consider them as agents, and to intrust them with their property for transportation, is sufficient evidence of their authority. Under such circumstances, it is not to be expected nor required that individuals shall ask the exhibition of their authority, when it is generally known to the public, and recognized by the agents of the company.

It seems that in virtue of the bill of lading, advances were made by the consignees, Burritt & Johnston. These advances gave them a lien upon the goods, for re-imbursement, and vested in them a right paramount to that of all others. Even the consignor had no right to stop the goods in *transitu*, or to make any disposition of them, whatever. By the bill of lading, the property in the goods for the purpose above stated, was vested in the consignees. And the defendants, as carriers, were responsible for their safe delivery, in quantity and in the same condition as at the time of their shipment to the plaintiffs, in New York. This, it seems, the defendants have not done. A part of the goods appear to have been abstracted by the consignor, at Toledo; and the remaining part was delivered at New York, a portion of them in a damaged state.

It seems that forty-nine bales of the hemp, abstracted from the freight, in the bill of lading, were shipped on account of Salsbury, the consignor, to the care of Burritt & Johnston, on the 20th of October. But these bales, if received, were not received at the time of the first receipt of the goods by the plaintiffs, and it is submitted to the jury whether there is evidence of their delivery subsequently.

On the 20th of May, 1846, it appears twenty-eight bales of hemp were shipped by Cobb, at Toledo, on account of Salsbury, to Everett & Battelle, of Buffalo; and on the 19th of July, 1846, it seems Salsbury received one hundred dollars on a compromise for the loss on the hemp.

The compromise can not affect the rights of the plaintiffs. Salsbury had no power to make it, against the interests of the consignees.

On these facts, the question arises—

1. Whether the plaintiff can maintain an action against the defendants? Of this, I suppose, there can be no doubt. He was the owner of the goods, by the advance he made, and the transfer by the bill of lading against the consignor and all others, until he was indemnified for the money advanced, and costs and charges.

2. On what ground shall the liability of the defendants rest? They are responsible for the injury done to the goods, by a failure in the performance of their contract. And the court instruct you, gentlemen of the jury, to ascertain the value of the goods, in a sound state as when shipped, at the time of their delivery to the plaintiffs in New York, and in this estimate you will include any part of the goods not delivered. From this you will deduct the gross amount for which the goods sold, and by deducting this sum from the estimated value of the goods in a sound state, at New York, at the time of their delivery, the difference will show the damages to which the defendants are liable.

But this does not show the measure of damages which the

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plaintiffs are entitled to recover. Although their lien on the goods was paramount to all others, it was not an absolute property in them, but a qualified one, to secure them in the advances made. These advances, with interest, deducting therefrom the net proceeds of the goods sold, will constitute the amount which the plaintiffs are entitled to recover. And if this amount shall be less than the general damages before stated, still the recovery of the plaintiffs can not exceed the sum above stated. But if the advances and interest shall exceed the value of the property in a sound state, the plaintiffs can only recover the amount of general damages, leaving to them a recourse against the consignor for the residue. It is supposed, however, that the advances, etc., will fall short of the value of the property in a sound state.

By agreement, verdict set aside, and judgment entered for one hundred dollars and costs, the plaintiffs retaining the net proceeds of the sale, etc.

W. W. GAULT v. JOHN WOODBRIDGE ET AL.

A levy on property, real or personal, should have such certainty as to show to a subsequent purchaser, on what the levy was made.

Short of this, there can, it would seem, be no notice to a subsequent purchaser.

Parol evidence, after conflicting rights have grown up, can not be received, to make the levy certain, which before was wholly uncertain.

A levy on one-half of a lot, without designating which half, or of one hundred acres, in a section, is too indefinite to convey the title.

A defective levy being set aside, on motion, makes good a junior levy.

Mr. *Stanbery* for the plaintiff.

Mr. *Swaine* for defendants.

OPINION OF THE COURT.

THIS is an injunction bill. On the 2d of September, 1823, the Bank of the United States recovered a judgment in this court against Q. Davis as principal, the complainant Gault and John Evans, as sureties of Davis, for seven hundred fifty-

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four dollars and twenty-nine cents damages and costs. That the sum of forty-eight dollars eighty-one cents was made on execution April, 1824, and six hundred eighty-two dollars May the 23d, 1824, from Davis, the principal debtor. That upon a *fi. fa.* being issued on the judgment September 18th, 1830, the deputy marshal on the 26th of the same month made a levy, in fact, upon a part of out-lot number nine, adjoining the town of Newark, described in the agreed case and in the affidavits of the appraisers, but made return of the levy as is set forth in the answer—that is, without describing what part of the lot was levied upon.

From the affidavit of the appraisers, it appears they appraised the specific part of the lot so levied upon. That at the time the levy was made, Davis was seised of the part of the lot levied on, and there was then no other lien or incumbrance upon it. That the part of the lot levied on was worth seventeen hundred dollars; and that Davis had no other property subject to execution. On the 16th of October, 1839, the specific part of lot nine was levied on, under another execution in favor of the Clinton Bank of Columbus, which was a subsisting levy, when the levy under the execution of the Bank of the United States was set aside. In June, 1840, Davis conveyed the part of the lot levied on to Hagg and others. At December term, 1841, on the motion of the attorney for Woodbridge, the assignee of the judgment of the Bank of the United States, the levy under the said execution was set aside, and the property of the complainant Gault is now under execution, no other property of Davis being found to levy upon.

And on the part of the complainant it is insisted, on the above facts, he is clearly entitled to relief.

It is contended that the levy, though vague, as returned, was not void. That a sale under it would have passed a good title, upon proof that the actual levy and appraisement were specific. Or it might have been amended on motion.

And it is urged the cases of *Matthews v. Thompson*, 3 Ohio Rep. 272, and *Douglass v. McCoy*, 5 Ohio Rep. 522, are conclusive upon the point. In the first case the levy was upon one hundred acres in section four, town seven, range four, with no further description. A sale was had without amending the levy, and upon ejectment the court held that the uncertainty of description might be supplied by parol.

In *Douglass v. McCoy*, the levy was upon two-thirds of lot number one. The court say such a description is defective, but may be made good by parol, and they refer to the testimony of the sheriff, that a specific part of the lot was appraised. This parol proof was admitted, and by force of it, the levy held good against a purchaser under a subsequent deed from the judgment debtor. That by this doctrine it was not necessary to amend the return. The act of Woodbridge in causing the levy to be set aside, at the December term, 1841, wholly released the lot, and thereby it became liable to the subsequent execution, in favor of the Clinton Bank of Columbus, and is wholly lost, so far as the Bank of the United States' judgment is concerned.

The judgment of the Bank of the United States was not a lien, it is said, upon this lot, as the title to it was acquired subsequent to the judgment. But, if the judgment were a lien upon it, the limitation of the lien had run, before the levy was set aside, so that by setting aside the levy, the subsequent levy in behalf of the Clinton Bank was made good.

We entertain great doubts whether the doctrine of making defective levies good by parol, under the sheriff's deed, has not been carried too far. It is important to the purchaser at sheriff's sale, and to the person whose land is levied upon and sold, that there should be no uncertainty in any part of the proceedings, which should involve the title. This would prevent the sale of the property at a reasonable price, as no one would give full value for land where the title is doubtful. And the purchaser would at least purchase a law suit, if he

did not lose the property. As a question of policy, as well as one of great interest to the parties concerned, there should be required on a levy that degree of certainty which would enable any one to know the land taken in execution. Short of this, it is difficult to say that it gives the proper notice to a subsequent purchaser, or to a plaintiff who causes his execution to be levied upon it.

How was it possible for a purchaser to say in what form the two-thirds of the lot levied on should be surveyed, or from what part of the section the one hundred acres levied on in the other case, should be taken? Where one-half of a lot was advertised and sold for taxes, the Supreme Court held the title was bad for uncertainty. *Ronkendorf v. Taylor's Lessee*, 4 Peters, 349.

A motion made to correct the levy on a part of lot nine, would not have been granted by the court, after the second levy was made. At least, in granting such a motion, the entry could not have had relation back to the first levy, so as to give it an advantage over the second. The court could not in that form affect legal rights. They must stand or fall upon their original legality.

The only question in the case is, whether Woodbridge, the assignee of the judgment, in relinquishing the levy, gave up a legal or equitable right, which released the complainant from his suretyship. After an instrument, by which the principal and his surety are bound, is reduced to judgment, I suppose the suretyship is merged in the judgment, and that the relation and its consequences cease to exist. The statute makes a special provision that sureties shall be designated, or may be designated as such, in the rendition of the judgment, which shall require the property of the principal to be exhausted, before that of the surety shall be levied upon. But where the judgment is not so entered, it is supposed that the relation of principal and surety can not be carried beyond the judgment. The surety, by paying the judgment or debt, may

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secure an immediate recourse against his principal, and this seems to be his only recourse, except where a bill may be filed to compel the principal to bring suit. But the principal is not, on general principles, bound to active diligence.

But if the rights of the surety exist after the judgment, we should not be inclined to say, that the complainant having been passive in the matter, he has no claim to a release from his suretyship by the withdrawal of the levy by Woodbridge. The right was too uncertain and doubtful to be followed by such a consequence.

The bill is dismissed, and the injunction dissolved at the costs of the complainant.

BEARDSLEY v. SWANN.

In the use of his own property, a man must be careful not to injure his neighbor.

An excavation of the sidewalk opposite his own house, for a vault, being authorized, provided he kept it covered, but being left uncovered, the plaintiff at night fell into it, and was injured—held, that the defendant was responsible.

To sustain the action, the plaintiff must show that he used ordinary caution, and that the defendant was negligent.

In estimating the damages, the jury will consider the injury done, the pain endured, the time lost, and the expense incurred.

Messrs. *Ewing* and *Stanbery* for plaintiff.

Messrs. *Swayne* and *Andrews* for defendant.

OPINION OF THE COURT.

THIS action was brought to recover damages from the defendant, for an injury suffered by the plaintiff, in falling into the defendant's cellar, which had been opened on a part of the sidewalk, and left carelessly, etc.

It seems that A. Westwater, in April last, lived in Columbus, and about a quarter before nine o'clock in the evening, was walking along the street, and found the plaintiff down in the vault, which extended into the street from the defend-

ant's house the width of the sidewalk. The depth was six or eight feet. Witness and another person helped him out. He complained that one of his arms was injured. There were no guards constructed around the excavation. A boy fell into it the evening after the plaintiff fell in. It was a moon-light night, but any person walking on the sidewalk was liable to fall into the vault. It had not remained open long. There was timber on the street, from three to five feet from the curb stone. The vault extended to the curb stone. The plaintiff wore glasses, his sight being somewhat impaired by age. There was no danger of falling into the vault in the day time.

Mr. *Sparrow*, a witness, says there was no protection to the side of the vault. Witness fell into it the evening before the plaintiff's accident. The plaintiff's left arm was injured; six months afterward it was deformed, and he could use it but little.

An objection was made to any evidence as to the suffering of the plaintiff from the injury. That it should be confined to time lost, expense incurred, and permanent disability. But the court overruled the objection, and said, that the bodily suffering was a part of the injury received, and should be considered by the jury in making up their verdict.

The Doctors, Thompsons, attended the plaintiff as his physicians more than a month. The radius, or large bone of the plaintiff's left arm was fractured, and the smaller bone dislocated. Several of the witnesses stated that the arm of the plaintiff is somewhat deformed, and that his wrist is enlarged and remains stiff.

By an ordinance of the city, dated July 25th, 1839, it is provided that one-third of the street may be occupied with building materials, provided, that the gutter and one-half of the pavement or side walk, be left free and clear of all incumbrance. And by an ordinance of the 30th of June, 1834, it is declared that vaults may be dug under the side walk, but they must be covered.

This action, gentlemen, is founded upon the principle that no one shall use his own property in such a way, as to injure his neighbor. The owner of a carriage must so drive it, as not to come in contact with his neighbor's carriage or person. And there must be negligence on the part of the person of whom damages are claimed, and the plaintiff must not himself be in fault. If he contributed to the accident, from which the injury resulted, the law will give him no compensation. For where two individuals are equally in fault, or even where the defendant may be more in fault than the plaintiff, yet if the acts of the plaintiff influenced the injury, there can be no recovery.

It seems that in the present case, the defendant had a right to extend his vault to the curb stone as he did, but he does not appear to have regarded that part of the ordinance which required him to keep it covered. And if, from this negligence, any one was injured, who used ordinary care in walking on the side walk or street, the defendant is responsible. The vault, it seems, was in no way protected, and that passers by in the night, were liable to fall into it. Several, it appears from the evidence, actually fell into the vault, but it is not known that any were injured except the plaintiff.

The counsel in the defense charge carelessness on the plaintiff, and say, had he used the ordinary caution of persons walking at night, he could not have fallen into the vault. There is no particular evidence showing the carelessness of the plaintiff, unless it be inferable, from the fact that he did fall into it. And this inference, it would seem, from the evidence, can not be drawn in the present case. Other persons had the same misfortune to fall into the vault. And the witnesses say, that any one passing on the side walk at all, would be liable to the accident.

The inquiry is not whether the plaintiff, by the use of extreme caution, might not have avoided the vault. Who could presume that he threw himself into it, in order to sue

the defendant and recover damages! This would be so strange a course of action, as not to be a matter of presumption, unless the evidence prove facts which render it probable.

The amount of damages must depend upon the exercise of your judgments, on the facts. Neither this nor any other case of contract or of tort, is a matter for the exercise of the mere discretion of the jury. The amount of the injury received, the pain endured, the expense incurred, and the negligence of the defendant, are matters for your deliberation and decision. And every one of the items named will increase or reduce the damages, as you may believe to be just and proper under the circumstances.

The jury found for the plaintiff——damages. Judgment.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1848.

CATLIN v. UNDERHILL.

Where a debt is due to two individuals, both of whom die before the amount was adjusted, and the settlement was made after the death of both, with the executor of one, and two notes were given to him for the balance, it may be recovered in his name.

The doctrine of survivorship, does not apply to a single transaction of this character.

It is not doubted, however, that had only one of the parties died, the survivor might have sustained his action for the amount due.

Mr. O'Neal for plaintiff.

Mr. Yandes for defendant.

OPINION OF THE COURT.

This action is brought on two notes, each for two hundred and eighty dollars, thirty-five cents, dated 29th September, 1843, one payable in one year, and the other in two years, with interest. The case was submitted to the court on the following facts:

Elijah Farris and Lynde Catlin, loaned the defendant one thousand dollars. This was before Catlin's death, who died in 1833, and the plaintiff was appointed his executor. Elijah Farris died in 1842, and Charleston Farris was made his executor. Payments had been made on the loan, but the account was not closed until 1843, when the above notes were executed. Both of the principals being dead, the adjustment was made with the executors of Lynde Catlin.

The notes were given for the balance due, and two notes were given that one might be handed to the estate of Elijah Farris. As both notes were given payable to the executor of Catlin, he refused to deliver one of the notes to Charleston Farris' demand, on the alleged ground that the estate of Farris had received its full share of the loan.

This is not the case of an ordinary co-partnership. It was a loan made jointly to the defendant by Catlin and Farris. It was a single transaction, and no presumption of debts can arise, as in a case of ordinary co-partnership, where the survivor is held responsible. From the nature of the transaction, it is impossible that the doctrine of survivorship can apply. No debts were contracted by the parties, jointly or separately, in making the loan. The reason, therefore, which applies to a partnership, can have no application to this joint contract. In making the adjustment, therefore, with the executor of Catlin, no principle was violated nor was any interest or policy disregarded.

In 1 Dall. 248, it is said, that a payment to an executor or administrator can be no satisfaction to a surviving partner, who has the sole right of suing for and of receiving the money due to the company.

The law makes the surviving partner liable for the joint debts, consequently he has the exclusive control over the partnership effects; and every action founded on a joint transaction, must be brought in his name. It is therefore contended that this action can not be maintained.

At the time the balance due was ascertained, and the notes were given, both of the principals were dead. That there was fraud or unfairness in the act of adjustment, is not pretended. Two notes were given that each executor might have one half of the balance, but as both notes were payable to the executor of Catlin, and suit became necessary, it would seem to be better that the notes should be payable to one executor, so that one suit only would be necessary. The

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executor of Catlin will be responsible to the other, should it be found that he did not receive his share of the loan.

Where a promise is made to pay two persons, and one of them dies, there can be no doubt that the survivor may maintain an action on the promise. And it is proper that the action should be in his name. But when both the principals are dead, and there can be no liability growing out of the transaction, and notes have been given to the executor of the individual who first died, we think the action may be maintained in his name, because the reason on which the rights and responsibilities of a surviving partner do not apply. In such a case, it is unnecessary to inquire which of the individuals died first.

Judgment for plaintiff.

DOE EX. DEM. SARGEANT'S HEIRS v. STATE BANK OF INDIANA.

By certain statutes, provision is made for establishing seats of justice in Indiana. Commissioners were appointed, and other officers, who were to receive donations of land, or purchase the same, etc.

In establishing the seat of justice for Tippecanoe county, certain proceedings were had, under the law, and a bond was taken from Samuel Sargeant, "to the Board of Justices of Tippecanoe county," to convey to them, when they should be organized, certain lots for public purposes.

The seat of justice being established at Lafayette, in a summary mode provided, suit was brought against the heirs of Sargeant, for a title to the property which their ancestor agreed to convey. A decree of conveyance was entered, and the conveyance, in pursuance thereof, was executed.

The property thus conveyed has become very valuable, and the heirs have brought an ejectment to recover it, on the ground that the proceedings were illegal and void by which a decree of title was obtained.

The bond, though it bound the obligor to convey to a board not *in esse*, is not void or inoperative.

It is fairly within the statute.

The court held, that notice was given to the heirs, and this is conclusive in the case. The fact of notice can not collaterally be denied.

But the dedication is good at common law, if the statute had not been technically complied with.

The property thus donated, by improvements has become immensely valuable.

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And after the lapse of many years enjoyed by the public, the title must be held good.

Messrs. *Smith* and *Lockwood* for plaintiffs.

Messrs. *White* and *Baird* for defendant.

OPINION OF THE COURT.

THE plaintiffs, heirs of Samuel Sargeant, who claimed under the patentee by deed, claim the lots in controversy, and also other grounds within the town plat of *Lafayette*. The lot and the improvements thereon are proved to be worth from twelve to fifteen thousand dollars. The patent and deed are in evidence, and also proof of the heirship of the lessors of the plaintiff.

To understand the defense, it is necessary to refer to the statutes under which it is made.

By the act of the 20th of January, 1826, the county of *Tippecanoe* was established, and certain commissioners were named to fix the seat of justice. They were to meet the first Monday of May ensuing. The qualified voters, at the time of electing a clerk, recorder, etc., were authorized and required to elect five justices of the peace, who were to constitute a county board, etc.

The act of the 14th of January, 1824, provided for the appointment of five commissioners to fix on the seat of justice for a new county. "And it shall be the duty of the commissioners to receive donations in lands from any person or persons owning lands in such county, and offering donations for the use of the same," etc. "The said commissioners shall inquire and ascertain whether any land on which they may be inclined to fix the seat of justice, can be obtained by donation, or by purchase at a reasonable rate," etc.; "and the commissioners shall take a bond, or bonds, of any person or persons proposing to give or sell any such land payable to the board of county commissioners, and their successors in

office, conditioned for the conveyance of such tract or tracts of land so given or sold, to such person as the county commissioners shall appoint as agent to receive the same, which bond or bonds the commissioners shall deliver to the county commissioners, together with a plain and correct report of their proceedings, containing a particular description of the land so selected, which shall be considered the permanent seat of justice for such county."

By the 2d section, the agent is required to give bond, "and the county commissioners and said agents, are hereby vested with all further powers necessary to carry this law into full and complete operation, according to the true intent and meaning thereof."

Section 4 provides, That the county commissioners, after receiving the report, are required "to appoint some suitable person, a resident of such county, as agent, whose duty it shall be," after giving security, "to receive good and sufficient deeds of conveyance, for any land which may have been given for the use of the county as above provided, and to lay off the same into town lots, etc., as the county commissioners may direct; he shall proceed also, from time to time, to sell the said lots, or so many of them as the said commissioners may deem proper, on such terms as the county commissioners may consider most advantageous to the county; and to collect all moneys for the sale of said lots, and pay the same into the county treasury; he shall also make conveyances to the purchasers of such lots, and after the payment of certain expenses out of such moneys, the balance shall be applied for the construction of public buildings, etc."

By the act of the 3d Jan'y, 1824, a county board of justices are established, with corporate powers. The justices, by the 4th sec., are required to meet on the first Mondays of January, March, May, July, September and November, in each year; appoint a president, etc., and if the circuit court shall set on any of said days, the county board of justices

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shall meet on the Monday succeeding such term. The 5th section, required the clerk of the circuit court to attend the meetings of the county board of justices, and keep a record of their proceedings. All powers possessed by the commissioners of the county, are vested in the justices of the county board.

On the 4th of May, 1826, Samuel Sargeant, with others, entered into a bond in the sum of ten thousand dollars, conditioned "that they shall well and truly convey, or cause to be conveyed, unto the board of justices of Tippecanoe county that may hereafter be organized, and their successors in office, by way of general warranty deed, certain lots of ground designated. This bond was filed in the Clerk's office, 7th November, 1827, and recorded.

On the same 4th of May, 1826, the commissioners appointed made their report, establishing the seat of justice at Lafayette, and they state that "they have received as donations from the proprietors and others, for the benefit of said county, the following described property, viz: All the even numbered lots in said town, amounting to seventy, and other grounds for which a title bond is herewith transmitted, together with a plan of said town as recorded in the Recorder's office at Crawfordsville, reserving, for the use of a county library, ten per cent."

On the 5th day of July, 1826, the Tippecanoe county court of justices met, as appears from their record, being duly commissioned and organized. They received the return from the commissioners appointed to locate the seat of justice, etc., received a bond from Samuel Sargeant for ten acres of land, east and adjoining the town, etc., and also other donations, etc.

The record of the circuit court of Tippecanoe county of May term 1828, was given in evidence. From this record it appears that at November term 1827, Peter Hughs, agent for the county of Tippecanoe, by Curry, his attorney, appeared and moved the court to appoint a commissioner to convey

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real estate in conformity to a title bond, given by Samuel Sargeant, dec'd, and others therein named, to the board of justices, and which bond he now here files for the conveyance of certain town lots, and also a bond by himself for the conveyance of ten acres, etc.; "and it appearing to the satisfaction of the court that proper and legal notices have been given of this motion, R. Johnson was appointed commissioner to make the conveyance, and the deed was executed by the commissioner under the decree of the 7th of June, 1827.

It is objected that the bond given by Sargeant and others is a nullity. 1. For want of parties. 2. For want of delivery.

To make a good deed parties capable of contracting are indispensable. At the date of this bond, it appears from its face that the obligees were not *in esse*. The obligors bound themselves "well and truly to convey, or cause to be conveyed, unto the board of justices of Tippecanoe county, that may hereafter be organized and their successors in office." This bond, it is contended, is void at common law, as there was no obligee at the time it was executed and delivered. Shep. Touch Stone 235, 367-8. 1 Cruise. 415; 8 John. Rep. 310; 9 John. 73; 2 Blackstone 276, 304. And that it is also void as a statutory bond, because it was not taken under the provisions of the statute. The statute requires the bond to be taken "to the board of county commissioners of such county and their successors in office," and the bond was taken "unto the board of justices of Tippecanoe county that may hereafter be organized, and their successors in office." 4 Ohio 169.

A bond, it is insisted, not good at common law, is also void under the statute, as the statute does not attempt to create obligees not *in esse*, and a doubt is suggested whether the legislature had power to make such a provision. There can be no doubt that they have such power, but it seems no special provision to that effect was made in this case. The bond being void when delivered to the commissioners, could

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not be made good by any subsequent delivery as it was not, in the first instance, delivered as an escrow.

At the time the bond was handed to the commissioners, from the conditions expressed upon its face and the nature of the transaction, it was not to bind the obligors unless the seat of justice should be established at the place designated; that was the consideration on which the instrument was executed. Under the law the commissioners were required to "inquire and ascertain whether any land where they may be inclined to fix the seat of justice by donation or purchase," etc. This was preparatory to their establishing the seat of justice. After the execution of the bond the commissioners were not absolutely bound to fix the seat of justice at the place designated in the bond. The bond was then given on the condition that the seat of justice should be established as contemplated by the obligors.

The condition of the bond was, that the obligors would convey such tract or tracts of land so given or sold, to such person as the county commissioners shall appoint as agent to receive the same." Suppose that this land had been purchased of Sargeant and others, and the money paid, could they in a court of chancery contend, with success, that the bond was void? This may be admitted as a question at common law. There being no obligee, no action at law could be brought on the bond, for a breach of its conditions. That a deed takes effect from its delivery is admitted; and also if it be delivered as an escrow, it does not take effect until the condition happens. The authorities read by the plaintiffs' counsel, are recognized as good law; but the question is repeated, could such a defense be sustained in a court of chancery, had the ground been purchased? The answer must be in the negative.

There is no want of certainty in the terms of the contract, there could be no impeachment of the consideration. No court of equity could permit the obligors to withhold the

money, and the land also. And if this would be the result in a case of purchase, the donation occupies stronger ground.

In selling, the vendor may have parted with all the land he owned—in making the donation his object always must be, to enhance the value of the remaining tracts. And by an enhancement of the value of these, by the establishment of the seat of justice, he has a greater compensation than by a sale of the land. If this action, therefore, were a bill filed by the person appointed by the commissioners, or their successors, the board of justices, to receive the conveyance of the lands in question, I should be inclined to decree a conveyance.

But this is an action at law, and it is supposed that it presents the question, whether an action at law could be maintained on the bond. This is not the view of the court. The action is not on the bond, nor is it necessary to decide the questions raised, as to the validity of this bond at common law. If the decree of the circuit court shall be sustained, the questions in regard to the bond are not open for discussion. The bond has become merged in the decree. If the circuit court had jurisdiction of the case, we can not supervise the proceeding as would be proper on a writ of error or bill of review.

It is objected to the record of the circuit court that it had jurisdiction of neither the parties, nor the subject matter of the proceeding.

The circuit courts of Indiana have general jurisdiction, as well in chancery as at common law. But it is contended that this was a special proceeding not in accordance with the common law, and that the provisions of the statute must have been strictly complied with.

And it is argued that the bond being void, afforded no ground of action for a court of law or chancery. The remarks already made will answer this objection. If there be enough on the face of the bond, as already suggested, to enable a court of chancery to decree a specific execution of the con-

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tract, the name in which the suit was brought might be a matter of error, but it would not render the proceeding void.

The suit in the circuit court was brought against the heirs of Sargeant, and it is objected that this is too vague and indefinite, and not within the law. It seems Sargeant, the ancestor, died without a will, and it may be, though it does not so appear in the proceeding, that the given names of the heirs were unknown to the party suing. Where such is the fact and is made known to the court by the affidavit of the complainant, the court are authorized to make such order in regard to notice as it may deem proper.

In regard to notice to the parties, in their record, the circuit court say, "and it appearing to the satisfaction of the court, that proper and legal notices have been given," etc., and this presents the question, whether such an entry upon the record can be controverted. In *Dixon v. Boyer*, 7 Black. 547, a suit was brought by notice and motion, under the act of 1838, against a sheriff for not returning an execution. There was judgment by default, damages were assessed by a jury and final judgment was entered for the plaintiff. In the judgment, the court stated, that it appeared to their satisfaction that notice of the motion had been served ten days, etc., it was held that there was no error in the proceedings. The court say, "the decisions of this court heretofore made, are to the effect, that, in a judgment by default, it must appear by the record that the defendant had notice of the suit, otherwise the judgment against him will be erroneous. 4 Black. 165; 5 Ib. 332. But we do not think it material, whether the fact appear from the return to the writ, or notice set in *hoc verba* in the record, or whether it appear from the substance of it set out in the judgment of the court."

Where a court has stated in its judgment, as in this case, that a legal notice has been served on the defendant, that fact can no more be controverted than any and every other part of the record. Where no appearance is stated in the

record, or an appearance by an attorney, the defendant may not be precluded from showing that he had no notice.

In the case of ——— v. ———, where suit was brought against two persons in Louisiana, one of whom resided in Missouri, and consequently no process was served upon him, but an attorney who appeared for the other party filed a general answer for both the defendants. And a decree being entered against both defendant, on which a valuable plantation was sold which belonged to the defendant in Missouri, on whom process was not served. The judgment was brought before the Supreme Court for revision, and the court held, on the affidavit of the counsel, that he was not authorized to appear for the absent defendants, and, by mistake, included him in the defense made; that, as to him, the judgment was a nullity. And in that opinion, the court say, if the appearance of the absent defendant had been stated on the record, by the express sanction of the court, the fact could not be controverted. In one of the New York decisions it is suggested, that the fact of the appearance being on the record does not preclude a court, when the record comes collaterally before, it, from inquiring into the fact. As before remarked, if the court, under such circumstances, may controvert the fact of appearance, there is no other fact on the record which it may not controvert. If any effect is to be given to the act of Congress, a record must be held conclusive between the parties, as to all matters decided by the court, when received as evidence.

The writ or notice is not a part of the record, unless made so by statute. In this case the notice was the act of the party, and not the act of the court. It had only to look at the notice and judge of its sufficiency. This the court did, and held the notice sufficient. Can the judgment of the court be shown to be erroneous, by an exhibition of the notice? If the notice had been copied into the record, however defective it might have been, yet, in the judgment of the court it was

good, the proceeding therefore could only be reversible by an appellate tribunal, it would not have been void.

The proceedings in this case were special and summary, but in regard to jurisdiction, the question rests upon general principles. It would seem, that in making the order for the deed, the court exercised chancery powers, rather than the functions of a common law court. The deed has been executed under the order of the court, and the heirs have realized all the advantages contemplated by their ancestor when he made the donation, now, by reason of the alleged defects in the proceeding, seek to recover the property, which, with the improvements on it, is of immense value. It includes a considerable proportion of the city of Lafayette, a populous and growing town. There has been acquiescence of more than twenty years, and now, under the circumstances, it is too late to urge merely technical objections.

But independently of any of the grounds above stated, there would be no question, it would seem, that the act of Sargeant and others is good as a dedication to public use. This is a higher and a broader ground than has been assumed in the argument. Under the common law, such a dedication could be sustained. The Legislature have regulated the mode by which this dedication shall be made, and if it should appear that some of the forms of the law had not been observed, the act would not be void. The proceedings, as far as they have been enacted by the parties, could be looked at as evidence of their intention, and this, beyond all controversy, would establish a dedication at common law. This doctrine necessarily exists in all the States. In Louisiana, where the forms of the civil law prevail, the same principle exists. It is applicable to innumerable cases of highways, streets, alleys, and public grounds, in all our cities, towns, and villages.

This doctrine is almost as old as the common law, and is sanctioned by a policy essential to the welfare of a civilized country. The principle, that where a special mode is pointed

out by statute, in which a thing may be done, it can be done in no other form, does not apply. Real estate can only be conveyed by a deed duly witnessed and acknowledged; and yet the courts have holden that a right may be dedicated to the public, regarded as a fee, when the persons making the dedication had only an equitable interest. The Indiana statute does not change the character of the act. It is a dedication for public use, to be appropriated for that use, as the statute provides.

In the case of *The City of Cincinnati v. The Lessee of White*, 6 Peters, 432, the defendant set up a title by legal conveyances from John Symmes, the patentee, to himself, for the lot of ground in controversy.

The city claimed the lot as part of a dedication for a common, made by the original proprietors of the town, when they had only the equitable title. The patent was not issued to Symmes until many years after the dedication, and the proprietors were never vested with the legal title. The court said, "Dedications of lands for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity, have been the want of a grantee to take the title; applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. But this is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention of the object of the grantor, and secure the public the benefit held out and expected to be derived from and enjoyed by the dedication."

That case was an action of ejectment, brought by the claimant to recover possession of ground, which, as in the case before us, had been dedicated to the public; and the defense by the city was set up, as in this case, a dedication. This is a sufficient answer to the objection that, if it were a dedica-

Atwood et al. v. Lockhart, Yarborough & Shoemaker.

tion, it could not be made a defense at law, but in equity. Upon the whole, there seems to be no legal ground on which the lessors of the plaintiffs can recover. And the jury were so instructed, if they believe the facts proved.

Verdict, not guilty.

ATWOOD ET AL. v. LOCKHART, YARBOROUGH & SHOEMAKER.

A purchase of goods made by two individuals, who take a third partner.

An action against the three can not be maintained by the seller of the goods, who had no knowledge of the contract.

There was no implied promise by the third partner, on which an action can be sustained.

Mr. *Yandes* for the plaintiffs.

Mr. *Barbour* for defendants.

OPINION OF THE COURT.

THIS suit is brought to recover the amount for the sale of certain goods, wares, and merchandize. Leave was given to amend the declaration, under which three counts were added, alleging that the goods, etc., amounting to fifteen hundred dollars, were sold to Yarborough & Lockhart, who afterward sold them to Yarborough, Lockhart & Shoemaker, etc.

To these counts there was a general demurrer.

This is not a case of guaranty. The sale was made originally to Yarborough & Lockhart. Before the commencement of the action, the sale was made of the same goods, to themselves and Shoemaker; and the assumpsit of the company is then alleged to the plaintiff. It does not appear that the sale was made by plaintiffs to Shoemaker, or that they had any knowledge of the fact.

It was not competent for Yarborough & Lockhart, who made the original purchase of the goods by their own act, thus to change the first contract. This might have been done

with the agreement of the plaintiffs; but this is not alleged in the declaration.

If A sell goods to B, who, at the request of A, agrees to pay C, to whom A is indebted the amount, C may maintain an action in his own name—the agreement having been made at the time of the purchase. But this is not the case before us. The plaintiffs may recover against Lockhart & Yarborough on the general counts. Demurrer sustained. 6 Black. 347. The indebtedment of A to B is not, of itself, any consideration for a subsequent promise by the former to C, to pay C the amount of the debt.

McVAUGHTER v. CASSILY.

A petition to remove a case from a State court to the circuit or district court of the United States, which was granted, creates no uncertainty, as the removal can only be to the circuit court.

Mr. *Sullivan* for plaintiff.

Mr. *Marshal* for defendant.

OPINION OF THE COURT.

THIS case is brought from the State court, under the act of Congress, by the defendant.

A motion is now made to dismiss the case, on the ground that the order for the removal was in the alternative, either to the district or circuit court. The petition to remove the cause to the next circuit or district court of the United States in Indiana, which was granted by the State court.

The district court has no jurisdiction in such a case, consequently it is void; the order for the removal was irregular. There is some irregularity in the application, and in the order of the State court, but as there can be no uncertainty or sur-

covered by the general averment. Such an averment, we think, is sufficient. By a reference to the law, which the averment alleges the patentees in the renewal complied with, the defendant is fully informed of its requisites, and what was done by the patentees.

There is also an objection as to the assignments, which by agreement are submitted to the court. Zebulon Parker and Robert McElroy, as administrator of Austin Parker obtained a patent for an improvement, on the original patent, dated 27th June, 1840. On the 3d July, 1841, McElroy, as administrator, assigned to Zebulon Parker all Austin Parker's interest—"the same to be held and enjoyed by the said Z. Parker, for his own use and behoof, and for the use and behoof of his legal representatives, the terms for which the letters patent are or may be granted for said improvements, as fully and entirely, as the same would have been held and enjoyed by said heirs, had the assignment and sale not been made."

On the 22d of February, 1839, Zebulon Parker assigned to George Parker, and to his heirs, the full and exclusive right and privilege of making and using, etc., Z. & A. Parker's patent, etc., for the term of fourteen years, from the 19th October, 1829.

And on the 19th of October, 1840, Z. Parker assigned to George Parker "all his right, title, etc., to the patent and improvement, etc., the same to be held and enjoyed by said George Parker, for his own use, etc., the full end of the term or terms for which letters patent are or may be granted for said improvements, as fully and entirely as the same would have been enjoyed by me had this assignment not been made."

In his objection to these assignments, the counsel refers to the case in 4 Howard, 687, and says, that he understands that the dissenting judges in that case objected to the decision of a majority, and denied that any right to the extension

of the monopoly was intended to pass by the legislature, or could pass to the assignee.

The dissenting judges in that case held, that as the renewal of the patent, by the law, was exclusively for the benefit of the patentee, and could only be done, where it was made apparent that he had not been compensated for his ingenuity, expense and labor, a general assignment of a part of the right could not give the assignee any interest in the renewal. That such an interest might be assigned, if the terms of the assignment clearly embraced the renewed patent. And, as conclusively showing the correctness of this position, it is proper to say, according to the decision of a majority of the court, if the whole of the patent had been assigned, there could be no renewal, for the benefit of the patentee. The minority considered that a general assignment of an interest in the patent was limited to the term named in the patent, unless the assignment clearly showed that a greater interest was intended to be given.

It is true, as suggested by the counsel, that the assignment of Zebulon to George Parker, made on the 22d of February, 1839, was for fourteen years from the date of the patent. But the assignment made on the 19th of October, 1840, an assignment for the patent and improvement, etc., to be held, etc., "to the full end of the term or terms for which letters patent are or may be granted for said improvements, as fully and entirely as the same would have been enjoyed by me had this assignment not been made." Here a reference is not only made to the patent which then existed, and "to any one that may be granted," clearly embracing any subsequent renewal of the patent, whether it should be under the statute or by act of Congress.

We think the assignments, for the purposes of this suit, are sufficient.

Barbee v. Willard & French.

BARBEE v. WILLARD & FRENCH.

The parties, plaintiff and defendants, entered into partnership and afterwards plaintiff selling out to the defendants his interest in the entire concern, dissolved, the embracing personal and real estate. The defendants agreeing to pay Barbee \$6,872 72.

In payment the defendant French agreed to give his note for \$3000 with interest, payable three years after date; and the other defendant agreed to convey to plaintiff 880 acres of land and other tracts on or before the 1st May, 1842. Upon the execution of such deeds and the note for \$3000, at the above date of May, 1842. Barbee was to execute a conveyance to the defendants of his interest in the partnership, etc.

The plaintiff avers he has always been ready. To the declaration there was a demurrer—which was sustained.

Smith for plaintiff.

Bradley and *Hammond* for defendants.

OPINION OF THE COURT, BY JUDGE HUNTINGTON

THE agreement set out in the declaration, (the original being lost) shows that the plaintiff and defendants were partners at Oswego, Indiana. The agreement is dated 19th March, 1842, and is in substance as follows: 1. Barbee being a resident of Troy, Ohio, and the defendants of Oswego, Indiana, agree to dissolve their partnership, the dissolution to take effect from that day, March 1842. 2. Barbee, the plaintiff is admitted to be the owner of one entire half of the lands, mills, goods, and assets of the firm. 3. He agrees to sell his undivided half to the defendants, consisting of lands, mills, wagons, horses, goods, etc. In consideration of such sale, the defendants agree to pay the debts of the firm in New York and elsewhere, some of which debts are due to Barbee individually, on notes then in his possession—and also to pay Barbee, the plaintiff, \$6,872 72, it being the sum agreed on as the value of Barbee's interest in the farm and in the property by him sold to them.

In payment of this sum of \$6,872 72, the defendant, French, agreed to give to plaintiff his note for \$3000, with interest, payable three years after date—and Willard was to

convey to Barbee eight hundred acres of land in Wells county, estimated at \$2000; forty acres in Delaware county, estimated at \$200; eighty acres in Shelby county, Ohio, at \$600; and a house and lot in Cincinnati, at \$1600, and also four hundred acres of land more, in Wells county, which by the terms of the contract were to be deeded to Barbee by Willard, on or before the 1st of May then next, namely, May, 1842. Upon the execution of such deed by Willard, and the execution of the note for \$3000, by French, which, it is manifest from the general tenor of the agreement, were to be done at the same time, May, 1842, Barbee the plaintiff, was to execute a deed of conveyance to Willard and French, of his interest in the lands, etc., of the firm, upon the execution of which, Willard and French were to execute a mortgage of the whole premises, (with the exception of the Pearson tract, so called,) to Barbee, to secure the performance of their part of the agreement—Barbee giving to Willard and French two and three years for the payment of the debts, (by notes,) due to said Barbee, by the firm. The debts of the firm due to others to be secured before the expiration of two years, so that Barbee was not to be bound for them as a member of the firm.

The agreement then states "possession is this day given by said Barbee of all the within described land and property, to said Willard and French, and said Willard and French do hereby give to said Barbee possession of said lands and lots to be deeded to said Barbee, and should said Willard decide to take back the twelve hundred acres of land in Wells county, at the end of three years from that date, he has the option so to do by paying said Barbee \$2 50 per acre, and interest thereon, from this date," also the same option in regard to the lands in Delaware and Shelby counties, Ohio, and the house and lot in Cincinnati upon the same terms. This is the substance of the agreement set out.

The plaintiff then avers that he has, 1. Faithfully kept

his covenants. 2. That he has always been ready and willing to execute deeds, etc., for the lands by him sold. 3. That on the 12th of October, 1846, at Oswego, Indiana, and at the residence of Willard and French, he did duly tender and offer to deliver a good and sufficient warranty deed, with relinquishment of claim to the land described on the agreement, and by him sold, according to the true intent and meaning of his covenants, and demanded performance, etc., on their part—that they refused, etc.

He then assigns the following breaches:

1st. That the defendants have never yet paid the said sum of \$6,872 72, or any part of it.

2d. That they have not settled up the liabilities of the firm, and especially the several notes due from the firm to the plaintiff individually, copies of which notes are set forth.

3d. That defendants are indebted to him the sum of \$4000, for which he held the notes of said firm, etc.

To this declaration the defendants have filed a general demurrer, and in support of the demurrer it is said that the covenants are dependent—that their deeds, notes, and mortgages are mutually to be executed on or before the 1st of May then next—that as neither did perform or offer to perform, their part of the agreement, on or before that day, neither party can sue upon the covenants in the agreement. In short, that after the expiration of the day, either party may, if he choose, regard the agreement as at an end.

I am inclined to think, upon a full examination of the terms of the agreement, that it was the intention of the parties that the deed, mortgages and \$3,000 note should be executed and exchanged at the same time, that is, on or before the first day of May, 1842. This being the case, it is very clear upon authority, that neither party could sue for a violation of the agreement, without first having offered to perform his part of it, or show some excuse for not doing so, and that offer to perform must be made within a reasonable time. It

is said in *Ballard v. Walker*, 3 Johns. Cases, 60, that the lapse of four years after the time of performance, rescinds the contract.

But, it is said in answer to this objection that, by the terms of the agreement, possession was given of the mills, personal property, etc., to the defendants, that this was a *part* of the consideration of the agreement, and as he has received a *partial* benefit, it would be unjust that he should enjoy that part and not be compelled to pay any thing for it; and this is the true doctrine undoubtedly, see 1 Chitt. Plead, 384. But according to the same authority, "it seems necessary to aver in the declaration, performance of at least a part of that which the plaintiff covenanted to do, or to show, that otherwise the defendants have received a partial benefit."

There is no such averment in the declaration. It is true, there is a general averment that the plaintiff has kept and performed all his covenants, stipulations, etc., but this is not sufficient. Demurrer maintained.

Judy, Administrator v. Gerard et al.

JUDY, ADMINISTRATOR v. GERARD ET AL.

The purchase of promissory notes signed by an individual or issued by a bank, if made *bona fide*, is not usurious.

If the purchase, however, was a device, to charge a higher rate of interest than the law authorizes, it is usurious.

Depreciated bank notes may be sold in the market at a greater or less price, as may be agreed upon between the parties. Like any commodity, they can be bought and sold without usury.

But any device or cover which may be resorted to, to evade the statute of usury, is corrupt and usurious.

Mr. *Sullivan* for plaintiff.

Mr. *Raymond* for defendants.

OPINION OF THE COURT.

THIS is an action of debt on a sealed bill, for the payment of seven hundred dollars.

The defendants pleaded that David Gerard, being much embarrassed, corruptly agreed, against the statute, with Henry Hays, that he should advance to him the sum of one thousand dollars, in notes of the bank of Illinois, which were then and there greatly reduced and under par, being worth only thirty-seven and a half cents in the dollar, and that the said Gerard should execute a note to him, with the said Jacob Hays security, for the payment of one thousand dollars, on or before the 1st of March, 1845, with a proviso that the sum might be discharged by the payment of five hundred dollars, before the 1st of October, 1843. In pursuance of which corrupt agreement, on the 12th of September, 1842, they executed a note to the effect, that before the 1st of October, 1845, they promised to pay to Henry Hays, or order, one thousand dollars, which may be discharged with five hundred dollars before the 1st of October, 1843. That the sum of five hundred dollars not having been paid, it was afterwards corruptly agreed, etc., that the said David should execute to him with

the said Jacob Hays and John Gerard as sureties, the seven hundred dollars payable 1st of October, 1845. That he should give up and surrender the said note of one thousand dollars. That the said note or bill was usurious, etc. Issue, etc.

The jury being sworn, the plaintiff offered in evidence letters of administration, which were objected to for want of proper authentication.

Provision is made in the 463d sec. of the Revised Statutes of Indiana, of 1843, that "a non-resident executor or administrator, duly appointed in any other State or country, may sue in Indiana, and a copy of his letters duly authenticated, in like manner as provided in the 47th sec. of this chapter, being produced and filed in the court," etc. Indiana has a right to prescribe the mode letters testamentary or of administration in any other State shall be authenticated. The letters offered were within the requisition of the act, and they are therefore admitted.

The thousand dollar note was offered in evidence by the defendant, under the plea of usury. This was objected to unless the signatures were proved. The note having been set out in the plea, the court will admit the note without proof of the signatures, there being no denial of them by oath or affirmation. Revised Stat. 711, sec. 216-17-18.

To constitute usury, gentlemen of the jury, there must be a loan of money and a corrupt agreement to evade the statute by securing more than the legal rate of interest. Under whatever pretense or device this may be done, whatever shape the contract may assume, if the object was to evade the statute it was usury, and the jury must determine from the facts and circumstances as to the intent of the parties.

The agreement to purchase from the plaintiff one thousand dollars, in notes of the Bank of Illinois, for which a note for one thousand dollars was given to be discharged on the payment of five hundred dollars, was not a usurious transaction, if there was a *bona fide* purchase of the Illinois notes, and in

JUDY, ADMINISTRATOR v. GERARD ET AL.

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the said Jacob Hays and John Gerard as sureties, the seven hundred dollars payable 1st of October, 1844. That he should give up and surrender the said note of one thousand dollars. That the said note or bill was usurious, etc. Issues, etc.

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Provision is made in the 463d sec. of the Revised Statutes of Indiana, of 1843, that "a non-resident executor or administrator, duly appointed in any other State or country, may sue in Indiana, and a copy of his letters duly authenticated, in like manner as provided in the 47th sec. of this chapter, being produced and filed in the court," etc. Indiana has a right to prescribe the mode letters testamentary or of administration in any other State shall be authenticated. The letters offered were within the requisition of the act, and they are therefore admitted.

The thousand dollar note was offered in evidence by the defendant, under the plea of usury. This was objected to unless the signatures were proved. The note having been set out in the plea, the court will admit the note without proof of the signatures, there being no denial of them by oath or affirmation. Revised Stat. 711, sec. 216-17-18.

To constitute usury, gentlemen of the jury, there must be a loan of money and a corrupt agreement to evade the statute by securing more than the legal rate of interest. Under whatever pretense or device this may be done, whatever shape the contract may assume, if the object was to evade the statute it was usury, and the jury must determine from the facts and circumstances as to the intent of the parties.

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Judy, Administrator v. Gerard et al.

JUDY, ADMINISTRATOR v. GERARD ET AL.

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If the purchase, however, was a device, to charge a higher rate of interest than the law authorizes, it is usurious.

Depreciated bank notes may be sold in the market at a greater or less price, as may be agreed upon between the parties. Like any commodity, they can be bought and sold without usury.

But any device or cover which may be resorted to, to evade the statute of usury, is corrupt and usurious.

Mr. *Sullivan* for plaintiff.

Mr. *Raymond* for defendants.

OPINION OF THE COURT.

THIS is an action of debt on a sealed bill, for the payment of seven hundred dollars.

The defendants pleaded that David Gerard, being much embarrassed, corruptly agreed, against the statute, with Henry Hays, that he should advance to him the sum of one thousand dollars, in notes of the bank of Illinois, which were then and there greatly reduced and under par, being worth only thirty-seven and a half cents in the dollar, and that the said Gerard should execute a note to him, with the said Jacob Hays security, for the payment of one thousand dollars, on or before the 1st of March, 1845, with a proviso that the sum might be discharged by the payment of five hundred dollars, before the 1st of October, 1843. In pursuance of which corrupt agreement, on the 12th of September, 1842, they executed a note to the effect, that before the 1st of October, 1845, they promised to pay to Henry Hays, or order, one thousand dollars, which may be discharged with five hundred dollars before the 1st of October, 1843. That the sum of five hundred dollars not having been paid, it was afterwards corruptly agreed, etc., that the said David should execute to him with

Judy, Administrator v. Gerard et al.

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The jury being sworn, the plaintiff offered in evidence letters of administration, which were objected to for want of proper authentication.

Provision is made in the 468d sec. of the Revised Statutes of Indiana, of 1843, that "a non-resident executor or administrator, duly appointed in any other State or country, may sue in Indiana, and a copy of his letters duly authenticated, in like manner as provided in the 47th sec. of this chapter, being produced and filed in the court," etc. Indiana has a right to prescribe the mode letters testamentary or of administration in any other State shall be authenticated. The letters offered were within the requisition of the act, and they are therefore admitted.

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Mr. *Sullivan* for plaintiff.

Mr. *Raymond* for defendants.

OPINION OF THE COURT.

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this view it is immaterial whether the notes purchased were worth more or less than the price agreed to be paid. They were worth, as averred in the plea, only thirty-seven and a half cents in the dollar, the price it would seem agreed to be paid was fifty cents in the dollar. But, if the purchase was *bona fide* there was no usury. The notes were not money, but promissory notes, the same as the notes of an individual, and when brought into market may be sold like other commodities, for what they will bring.

The sum of one thousand dollars was named in the note as a penalty, and would have been discharged at any time, on the payment of the five hundred dollars and the interest. The seven hundred dollar note was given, as appears from the plea, on condition that the note previously given should be surrendered. If the first note was given on a fair purchase of the Illinois bank notes, that purchase can not be held to taint with usury the note now in controversy; and in deciding whether it is usurious, we must be governed by the circumstances under which it was executed. If the jury shall believe that it was given as a shift or device, with the view to charge more than the legal rate of interest, and evade the statute, it was usury. So, in giving the first note, if it was not on a *bona fide* purchase of the bank notes, but done to evade the statute, and loan money for more than the legal rate of interest, it was usurious, and if the first note was tainted with usury, the objection applies equally to the one which was given in lieu of it.

Verdict for the plaintiff.

C. L. WILSON v. BLODGET ET AL.

A suit can not be removed from a State court into the Circuit Court of the United States, where a part of the plaintiffs or defendants are citizens of the State where the suit is brought and of some other State.

Mr. *Niles* for plaintiff.

Messrs. *Smith & Sullivan* for defendants.

OPINION OF THE COURT.

THIS case was removed from the State court under the act of Congress, and a motion is now made to dismiss it, on the ground that some of the defendants are citizens of the State. Blodget & Co. are citizens of Massachusetts; and it appearing that the defendants, who are citizens of the State, are mere agents and against whom no decree is prayed, and whose names may be stricken out of the pleadings, as they are not necessary parties, it is contended the jurisdiction should be sustained. It is clear that no suit can be removed from the State court by either party where some of the parties, plaintiffs or defendants, are citizens of the State where the suit is brought, and others of a different State. The motion to dismiss is granted.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JUNE TERM, 1848.

MARSH & COMPTON v. HULBERT & TRUMBLE.

A deposition expected which may be material on the merits, and where proper diligence has been used, is a ground for the continuance of a cause.

Mr. Edwards for plaintiffs.

Mr. Kating for defendants.

OPINION OF THE COURT.

A motion for a continuance of this case is made on an affidavit that the goods sold by the plaintiffs to the defendants, for which the present action is brought, were of an inferior quality, were overcharged and not worth the prices charged. Also that a deposition is expected which will prove that one of the plaintiffs' witnesses denied what he has sworn to in his deposition.

This is opposed as there was no offer to return the goods—no special warranty, nor is fraud alleged.

The object of the defendants is not to disaffirm the contract, but to show that more was charged for the goods than they were worth. We know not under what circumstances the goods were received, or whether the defects alleged were perceptible on a slight examination. It is said that a court will not grant a new trial on the ground that a witness examined can be impeached. Upon the whole, however, in this case, we think justice requires a continuance of the cause, unless the expected deposition shall be received so that the trial may be had at the present term.

Fraser v. Wolcott & Goodwin.—Thomas v. Wolcott & Goodwin.

FRASER v. WOLCOTT & GOODWIN.

Mr. *Smith* for plaintiff.Mr. *Powell* for defendant.

OPINION OF THE COURT.

THIS was an action of assumpsit. The defendants pleaded non-assumpsit, and that the note was signed by Goodwin as a partner of Wolcott, in both their names, when they were not partners.

By the 8th section Revised Statutes of 1845, it is provided, that in "actions upon contracts, expressed or implied, against two or more defendants, alleged to have been made or executed by such defendants, as partners, or joint obligors or payers, proof of the joint liability or partnership of the defendants," etc., unless a plea be filed under oath, denying the execution of the instrument by the defendants. The oath is appended to this plea.

It appears the defendants were formerly partners, but that their partnership had been dissolved before the execution of this note.

Non-suit.

THOMAS v. WOLCOTT & GOODWIN.

On an issue of partnership, an offer to pay the partnership note, if the holder would take property, is evidence. And also that the defendant said the note was signed by his partner.

Mr. *Logan* for plaintiff.Messrs. *Peter* and *Powell* for defendants.

OPINION OF THE COURT.

THIS suit is brought upon a note. The defendants pleaded, 1st. Non-assumpsit. And 2d. That the note was signed by Wolcott, who was not the partner of Goodwin, and had no right to use his name. Affidavit as to the truth of the plea. Jury sworn. A witness states, that Goodwin, on presentation of the note, offered to pay it, if the person presenting it would take property; said the note was signed by his partner; not specifying whether he was his partner at the time the note was executed or not. It was proved that there had been no partnership between the parties, for ten years past, in Illinois. The note was dated 13th October, 1845. Parties lived formerly in New York.

The court instructed the jury that the admission of Goodwin, that the note was signed by his partner, was evidence in the case, and from which, together with the offer to pay the note in property, they might infer a joint liability, unless such inference was opposed to other evidence in the case.

Verdict for plaintiff, and judgment.

MORGAN v. CURTENIUS ET AL.

Messrs. *Butterfield, Goodrich and Merriman* for plaintiff.
Messrs. *Powell and Peters* for defendants.

OPINION OF THE COURT.

THIS is an action of ejectment, to recover possession of twenty-three acres of ground. By a statute of Illinois, the fictitious forms and names of the action of ejectment are abolished. A patent for the land to John L. Bogardus, dated

the 5th of January, 1838, was offered in evidence, which was objected to, on the ground that the name of the patentee appears to have been altered by scratching out a dot over the letter i, which made the name Bogardus, instead of Bogardies, as it now appears. The court overruled the objection, observing that it did not appear that the alteration was material, or that it had been made since the patent came into the possession of the patentee.

It was proved that Bogardus, the patentee, died the 2d of June, 1838; and a copy of his will, and the probate thereon, was offered in evidence. This was objected to because the copy was not certified under the seal of the probate court. That court, formerly, was held to be a court of record, and had a seal. Now, it is not a court of record, and has no seal. This statement was made in the certificate of the judge of probate.

The act of 1845 requires the judge of probate to have a seal; and parol proof was offered to show there was a seal. The law makes a certificate without seal, valid where there is no seal. The court overruled the parol testimony offered, and admitted the certified copy of the will, etc.

A deed was then offered in evidence, made by the executrix to Cole, dated 25th September, 1845, for the land in controversy. And also a deed from Cole to Frink for one-third of the fraction; and afterward a deed from the same to the same, for one-sixth of the fraction, dated 22d of May, 1846. Deed from Frink to Morgan, the plaintiff, 19th December, 1846, for one-half of the thirty-three and one-third acres.

It is objected that the deed was made to Morgan, a citizen of another State, merely to give jurisdiction to this court.

The money with which Frink purchased the land, he borrowed, which, it appears, was afterward paid by Morgan, at or before the time the deed was made to him. This should have been pleaded to the jurisdiction of the court, but it is

not made to appear that there was any intention to commit a fraud on the jurisdiction of the court, and the objection is overruled.

To show an outstanding title, the defendants offered in evidence a deed from John L. Bogardus to Bigelow and McClure, for the thirty-three acres and ninety-three hundredths, dated the 5th August, 1884. This deed was proved before the clerk of the court, by proof of the hand writing of the subscribing witness, and of the grantor.

The act of Illinois, revised laws of 1845, 207, section 20, requires the officer who takes the acknowledgment of the grantor, or proof of the execution of the deed by a subscribing witness, to state that the grantor or witness is personally known to him. The certificate to the proof of this deed does not contain a statement that the witness who proved the deed was personally known to him, and this defect is fatal to the proof of the deed.

Parol evidence was then called by which the signature of the grantor was proposed to be proved, proof having been given that the subscribing witness had left the country, and had not been seen or heard from for fourteen years. To this evidence, the plaintiff objected until proof of the hand writing of the witness was made.

The court said the order of proof was a matter resting in the discretion of the court. That proof of the hand writing of the party was esteemed more satisfactory than that of the witness. *Valentine v. Piper*, 22 Peck. 90; in *Jackson v. Waldron*, 11 Wend, 178, 183, 196, 197, proof of the hand writing of the obligor was held not regularly to be offered, unless the party was unable to prove the hand writing of the witnesses. And such is the decision of a majority of the cases on this point. But judges seem to have so decided because it had previously been so decided, without any inquiry as to the reason of the decision. Under this view,

however, the proof is admissible, as the witness has left the country, and it does not appear that his hand writing can be proved. The evidence is admitted.

The act of Illinois, 8d March, 1845, provides, where a deed purports to convey a fee simple estate when the grantor has only an equity, he shall, on acquiring the legal estate, be considered as holding it in trust for the grantee.

It appears that on the 4th of August, 1832, Bogardus applied for the pre-emption of this land to the Register of the Land Office, for the land in question, which was granted. And that on the 15th November, 1837, he entered the land and purchased it. The conveyance to Bigelow and McClure was as follows: "I do hereby bargain, grant, sell and convey unto the said Bigelow and McClure, their heirs and assigns forever, two undivided third parts of all my right, title and interest in and unto the land, etc., and I do hereby covenant with the said Bigelow and McClure, that if at any time hereafter, I shall acquire an additional title to the said lot of land, the same shall enure to them in proportion to the interest hereby conveyed to them."

On the 5th of August, 1834, Bogardus conveyed his right and interest in the whole of the land, to Isaac Underhill.

These titles having been given by Bogardus before the emanation of the patent, under his claim of a pre-emption, are objected to by the plaintiff as void under the law. The 3d section of the act to grant pre-emptions, of the 29th of May, 1830, provides, "that all assignments and transfers of the right of pre-emption given by this act prior to the issuance of patents, shall be null and void." This act was continued in force by the act of the 14th of July, 1832, on the same subject.

It is argued that the above act of the 29th of May, 1830, only declared the pre-emption right should not be assigned so as to obtain a right of purchase. We suppose after

Z. Parker v. James F. Haworth.

emanation of the patent, we can not go behind it, and examine into the assignments. And the court instructed the jury, that the deeds given in evidence to show an outstanding title, and thereby defeat a recovery by the plaintiff, did constitute an outstanding title.

Verdict for the defendant. Judgment, etc.

Z. PARKER v. JAMES F. HAWORTH.

A patent may be assigned in part, or the whole of it.

An averment in the declaration that the defendant has made the thing "in imitation of the patent," is sufficient to sustain the action.

The machinery complained of, if the same in principle as the plaintiff's, is an infringement.

Parker's patent is for improvements on known machinery and a combination of mechanical powers.

There can be no infringement of the combination, which does not embrace all the parts.

But it is an infringement to adopt any improvement of the plaintiff's of any of the parts of the combination.

An inventor, under his patent, claims no monopoly.

Mr. *Logan* for the plaintiff.

Mr. *Weed* for the defendant.

OPINION OF THE COURT.

THIS action is brought, charging the defendant with a violation of the plaintiff's patent for a percussion and reaction water wheel. The defendant pleaded not guilty. The jury being sworn, the plaintiff offered an exemplification of his patent, containing certain assignments, in evidence, which was objected to by defendant, on two grounds: 1. that there is no proof of the original assignment to McElvey: and 2. That there is no proof that McElvey was administrator, as he assumed to be.

The assignment of a patent in whole or in part, is authorized by act of Congress, and it is required to be recorded in the patent office. The assignments in this case have been recorded, and the paper now offered contains a copy of them, duly authenticated; and the law of Congress makes such copies evidence, as well as a copy of the patent. Such copies, therefore, must be received, as *prima* evidence at least, of the genuineness of the originals on file; and absolute evidence of the correctness of the copies from the record.

Several witnesses were examined to show the value of the improvement claimed by the plaintiff. One of the witnesses, Mr. West, says he has built forty or fifty of Parker's percussion water wheels; and the question being asked him whether there were not other wheels similar to those of Parker's it was objected to, there having been no notice given, as the statute requires, and the court sustained the objection. The witness says, the product of Parker's improvement is nearly three times as great as the other wheels in use.

A question being asked of a witness whether the defendant throws the water upon the wheel through a spiral trunk, was objected to because the declaration contained no such averment. But the court permitted the question to be asked, as in the declaration the trunk was averred to be made in imitation of the plaintiff's patent.

Several witnesses were examined, who thought the improvement of no great value, and, in some respects, they considered it less valuable than the flutter wheel, generally in use: and some of them who are millwrights, do not think the defendant's wheel is an infringement upon that of the plaintiff's.

The case having been argued to the jury, the court observed to them, this action is brought to recover damages

Z. Parker v. James F. Haworth.

for a violation of the plaintiff's right. The policy of the law, which protects the right of the inventor, is wise. It stimulates genius, by endeavoring to secure a reasonable compensation to those who have spent their time and money in producing something of utility to the public. It is not a monopoly the inventor receives. Instead of taking anything from the public, he confers on it the greatest benefits; and all he asks, and all he receives, is that for a few years he shall realize some advantage from his own creation; not that he withholds his machine or discovery from the country, but that in distributing it he may receive a small compensation for the great benefit he confers.

The triumphs of the inventor are intellectual triumphs. His demonstrations are made through mechanical agencies, but these, in the highest degree, are attributable to mind; and the same may be said of our inventive mechanics generally. The range of their thought embraces the system of natural philosophy, in all its practical bearings; and in carrying out their views, the highest degree of mechanical ingenuity. Through the labors of these men our country has been advanced by machinery, on the land and on the water, in the saving of labor, and in a rapid and increased intercourse, and especially in the communication of intelligence, in the last forty years, more than could have been hoped for, without their instrumentality, in many centuries. And yet, how few of them are considered public benefactors. Their inventions are pirated, and they often reduced to indignity by the vindication of their rights.

The plaintiff in this case is not entitled to recover damages unless he shows that the defendant has violated the patent by using the machinery invented or improved by the plaintiff. There seems to be nothing in the evidence which can create a doubt, in regard to the invention claimed by the patent. And your inquiry will be chiefly directed to the infringement

charged in the declaration. To this the plaintiff is limited. If the defendant has arranged his machinery on the same principle as claimed by the plaintiff, he is guilty of infringement. You will understand that it is not essential that the wheel of the defendant, in its form, should be exactly similar to that of the plaintiff; but it must work on the same principle. The force of the water must be thrown upon it in substantially the same manner.

If you shall find for the plaintiff, you will assess such damages, as in your judgments shall be just. There are no circumstances in the case which call for exemplary damages. The defendant may not have been aware of the plaintiff's right, at the time he procured his machinery to be constructed.

Verdict for the plaintiff.

A motion was made in arrest of judgment, on the ground, that the declaration does not set forth the act complained of as contrary to the statute. This is necessary when an action is brought on a penal statute, but not in a case like the present, where damages are sought for on an injury done. Where the plaintiff sues for a penalty, as the statute is the only foundation of the action, the declaration must aver that the act is *contra formam statuti*. In *Tryon v. White*, Peters O. C. Rep. 96, it is said, "if the declaration in an action for the invasion of a patent right, fails to lay the act complained *contra formam statuti*, the defect will be purged after the verdict."

Another ground in arrest is stated, that the declaration should allege an infringement of the combination claimed in the patent.

It is a well established principle that where the invention consists of a combination of known mechanical powers, the use of a part less than the whole combination, would be no infringement. Each one of the different powers combined constitutes a part of the whole, but the invention is not in

Z. Parker v. James F. Haworth.

any of the parts, but in the combination of them. The parts of which the combination consists, remain unrestrained from general use, as before the invention.

But the plaintiff's invention consists, not only in the combination, but in the improvement of several of the parts of which that combination is composed. And the violation of one of them is an infringement for which an action will lie. The motion in arrest is overruled and judgment.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN.—JUNE TERM, 1849.

NESSMITH AND NESSMITH v. SHELDEN ET AL.

The courts of the United States will follow the established construction of a statute of a State, or the constitution of a State, if it do not impair the obligations of a contract, nor conflict with the constitution or any law of the United States.

It is important that there should be, but one rule of property in a State.

This rule of construction is followed without regard to the correctness of the rulings of the State court.

Acts that are prohibited by law can impose no obligation on any one, nor will the law take cognizance of any matters between those who have united to violate the law.

Mr. *Seaman* for the plaintiffs.

Messrs. *Romeyn, Harbough, Holbrook* and *Hand* for the defendants.

OPINION OF THE COURT.

IN the case of *Falconer and Higgins v. Campbell et al*, 2 McLean's Rep. 195, this court held that the act of the State of Michigan, "To organize and regulate banking associations," passed 15th of March, 1837, and the amendatory act thereof, of the 10th of January, 1838, were valid and constitutional acts; and consequently that the corporation, the Directors and Stockholders organized under those laws, incurred all the responsibilities imposed by them. But the Supreme Court of the State of Michigan, have since decided that the legislature by a general law, had no constitutional power to pass any act of incorporation, and that consequently, the above acts were void.

This conflict of decision, as might have been expected, induced this court to re-examine their decision with all the legal scrutiny and ability they could exercise on the subject, and, after duly considering the lights thrown upon the question by the Supreme Court of Michigan, we feel ourselves bound to say, that in no one of the important points ruled in the decision of this court, is our confidence shaken. The opinion delivered by us was submitted to a most careful and rigid scrutiny by Mr. Justice Story, in his lifetime, than whom we know of no higher authority in this or any other country; and his entire concurrence in the opinion has increased our confidence in its legal accuracy. But the point now to be decided is, not whether the decision of this court, or of the Supreme Court of Michigan, be correct, but whether the federal court, to be consistent with its general course, must not conform to the State decision, depending upon the construction, of a law of the State.

This point has often been considered and decided by the Supreme Court. On all questions involving the construction of State laws, which do not conflict with the constitution or laws of the Union, the federal courts follow the adjudication of the supreme court of the State, as a rule of decision. This is necessary to prevent two rules of property in the State, which would be productive of great mischief. So far has this judicial policy been carried by the Supreme Court of the United States; as to reverse their own decision, made conformably to State decisions, when a new rule was established by the State court. *Green v. Neal*, 6 Peters, 291. Under such sanctions, this court can feel no hesitancy in following, in the present case, the State decision. And we have only to remark, with the greatest respect for the high tribunal of the State, that we yield to the established policy of the Supreme Court, and not to our legal convictions.

The present being a bill to make responsible, under the general banking laws, the directors and stockholders of the

Detroit City Bank, which has become insolvent, a question is made what effect the unconstitutionality of the banking laws, as ruled by the Supreme Court of the State, has upon the institutions organized under those laws. How does it affect the stockholders, directors, debtors, and creditors of those institutions? This is a question of momentous consequence to the parties concerned, as the amount involved is large. It is also of great importance as a practical question.

In the case of *Green v. Groves*, 1 Doug., the Supreme Court of Michigan held, "that so much of the act under which the Bank of Niles was organized, as purports to confer corporate rights upon the association organized under its provisions, is unconstitutional and void." The Bank of Niles was organized under the same general law as the Detroit City Bank, consequently the decision, in principle, applies equally to both.

The act to prohibit unauthorized banking, Revised Statutes of 1846, it is made penal to be concerned, or in any way interested, in a bank not authorized by law.

On the 19th of April, 1827, an act to restrain unincorporated banking associations was passed, which subjected to a penalty of one thousand dollars, any one who becomes interested in any association for banking purposes, unauthorized by law. That act was re-enacted in 1833, and still remains in force, if not repealed by the general banking law.

Under this legislation against unauthorized banking and banks, the decision of the Supreme Court of the State, that the general banking law is unconstitutional, and the more recent decision, that under the general banking law, the organized companies are not corporations, it is difficult to find any principle on which the obligations on such associations can be enforced. They have no standing within the protection of the law, they having been established in defiance of its prohibitions. As between the individuals concerned, as *particeps criminis*, the law could give no aid.

United States v. Stephen Brown.—Chapin v. Siger et al.

And it is not perceived how an individual can become indebted to the bank, or have a claim on it, without being involved in its illegality.

Upon the whole, we think the demurrer to the bill must be sustained.

UNITED STATES v. STEPHEN BROWN.

Mr. *Norvell*, District Attorney.

Mr. *Seaman* for defendant.

OPINION OF THE COURT.

THIS was an action of trespass, for cutting timber upon the public lands. On the part of the defendant, it was proved that he claimed the land, under the act of Congress of the 4th of September, 1841. It was objected, by the district attorney, that a pre-emption right under that act can not be shown by parol. Last May, it was proved that defendant admitted that he had not paid for the land.

The court instructed the jury that the defense of the defendant could only be sustained by his showing that he had taken some steps to secure his pre-emptive right set up. That short of this, he could plead no justification or excuse for the trespass charged.

Verdict for plaintiff. Judgment.

CHAPIN v. SIGER, ET AL.

An agent is a competent witness to prove what he did as agent. The court held that a bill of lading could not be contradicted by parol. But, that evidence might be given that the consignee had notice that the goods belonged to a person different from the person named in the bill. And that a corrected bill of lading was forwarded to the consignee.

Chapin gave instruction to defendant not to sell the property, but to store it until it would command better prices. A notice at the trial to produce an original letter or paper, will not be enforced unless the paper be in the possession of the party or his counsel.

A letter press copy, made at the same time, can not be received as an original paper.

Depositions to contradict a witness will not be received unless the question as to the fact was distinctly put to the witness.

A demand and refusal, or an actual conversion, necessary to sustain an action of trover.

When a sale is made in disregard of instructions, except for advances, the consignor may recover damages.

Mr. J. M. Howard for plaintiff.

Messrs. Bates and Watson for defendants.

OPINION OF THE COURT.

THIS is an action of trover for two hundred and three barrels of flour, which belonged to plaintiff. Plea, not guilty. A jury being sworn, Jeremiah S. Littlejohn was offered as a witness, and was objected to by defendants' counsel, on the ground of interest. He and his partner were shippers of the flour, and if he shall now be permitted to prove a conversion of the flour by the defendant, it may relieve the witness from responsibility.

But the court held, that the witness and his partner acted as agents in shipping the flour, and there was no preponderating influence which would exclude him from giving testimony. In England the doctrine has been departed from, so far as to admit a witness interested, if not a party on the record, leaving his credit with the jury. But this witness has no interest which can exclude him.

The witness states that he was acquainted with the firm of Siger, Brown & Co., of Buffalo. The two hundred and three barrels of flour were shipped from Detroit, to defendants, 19th November, 1846, on board the propeller *St. Joseph*. The witness was asked who was the owner of the property; which question the defendant objected to, because

the ownership is shown by the bill of lading. 2 Starkie Ev. 283, "where goods are shipped on account of the consignee, the property must be recognized as being in him. 2 Camp. 86. Goods shipped to consignee, consignor can not maintain an action for them. 14 Wend, 26; Abbott on Shipping, 249; 4 Cowen & Hill's Notes, 1439. The court held that the bill of lading can not be contradicted. The property was shipped by Littlejohn & Co.; but the court permitted evidence that the consignee had notice the property belonged to Chapin, and that a corrected bill of lading was forwarded, which was admitted in evidence, requesting defendants to enter the flour on account of Chapin.

In January 7, 1847, the defendants were told by witness that they had sent the shippers an account of the sales of this identical flour, and they admitted the fact; but witness objected, because it was in pursuance of orders given.

Defendants admitted that they had received a letter informing them that Chapin owned the flour. In March or April, 1847, heard Chapin make a demand of the flour, 208 barrels, on a ware-house receipt; this was at Detroit; defendant said he was away from home, and did not know whether such a shipment had been made. Chapin demanded satisfaction; Siger refused to pay. This was before suit was commenced. Witness never did, in any way, satisfy the sale of the flour. At Buffalo, witness told the defendants that the flour belonged to Chapin, who had instructed witness, etc., not to have it sold, but to store it until better prices. Defendants said in the multiplicity of business they had overlooked the instruction. The letter of defendants giving an account of sales, was dated the 14th of December, 1846.

The defendants admitted that the account included all the flour sent by the St. Joseph, 19th of November, 1846. Flour, in 1846, at Buffalo, was worth from \$3 75 to \$4. Some sales were made for \$5.

A letter press copy was offered in evidence, of a letter

dated 31st December, 1846, to defendants. Notice was given to the defendants' counsel to produce the original. The counsel averred that they had not the original, and had never seen it. The court held, the notice was not reasonable, and that the defendants were not to be required to produce the original, unless it were in their possession, or in possession of their counsel, under such a notice. And that a letter-press copy, though written at the same time, could not be received as an original.

The defense made, was, that before the bill of lading was corrected, showing that the 203 barrels were owned by Chapin, defendants accepted on the shipment, bills drawn 19th November, 1846, exceeding the receipts for the sale of the flour, several hundred dollars. A bill, amounting to two thousand seven hundred and fifty-two dollars, was drawn on the shipment, the day it was made, which was accepted and paid, before the letter, correcting the error, was received. Afterward an advance was made on the same flour, on claim of Chapin.

Depositions were offered to be read to impeach the statements of Littlejohn, by proving certain conversations with the defendants, respecting this transaction. The plaintiff's counsel objected, because, Littlejohn, when under examination, had not been asked in regard to these conversations. The court sustained the objections, but permitted Littlejohn to be called by the defendants, and the questions were asked him.

The account rendered was proved to be correct; and that Littlejohn asked an advance, and, adding a few barrels, he obtained \$650. Littlejohn said that they would be safe in making a further advance, as flour had risen, and that he was authorized to dispose of the 203 barrels. Another witness states that the draft of \$2750 was accepted before the error was corrected.

On the part of the defendants it is insisted, to sustain this action, the plaintiff must show a demand of the 203 bbls.

of flour. 2 Saunders Pl. 414 and 883; 1 Camp. 429. And that the party on whom the demand is made must have it in his power to deliver the property. 2 H. Blk. 135. That excuses for not delivering, is not a conversion—the refusal to deliver must be absolute, or there must be a tortious conversion. 5 Barn. & Cres. 248.

It is also contended if the defendants were in advance when the two hundred and three barrels were received, defendants had a lien on the flour, and they could retain it against the plaintiff. That the factor has a general lien for any balance.

The court instructed the jury that, to support the action, there must be a demand and refusal, or an actual conversion of the property, and that they must find the right of property was in the plaintiff. And the court said to the jury, that it did not appear, from the evidence, that any draft had been drawn against the two hundred and three barrels of flour, or that Chapin had received the proceeds of the same. From the defendants' letters, dated the 12th and 19th of February, 1847, the draft for \$2752, was drawn against other property, which was received about the same time, and perhaps, in the same vessel, with the two hundred and three barrels. If the jury shall find the facts as suggested by the court, and they are referred to the evidence, and they shall be satisfied that there was a demand and refusal to deliver the property, and that it was not sold by the plaintiff's orders, the defendants being notified that the plaintiff was the owner of the flour, and that they were not in advance to the plaintiff, their verdict would be for the plaintiff for such damages as shall be equitable. That the plaintiff would be entitled to the rise in the market, for a reasonable time after the demand was made. That if the sale was wrongfully made, at a time when the article was depressed, the defendants having no right or authority to sell, would not fix the rule of damages for the plaintiff.

The jury found for the plaintiff. A motion for a new trial was made and overruled.

LOCKWOOD v. COMSTOCK AND BISSELL.

After the dissolution, neither partner by any note in writing, can bind the partnership, even for a debt contracted by it.

And in this view, a note is a new contract; though it be given to pay a debt of the firm.

An authority to one party to settle the accounts of the firm, collect and pay its debts, does not authorize the individual to give a note in the name of the late firm.

Messrs. *Sedgwick* and *Campbell* for plaintiff.

Mr. *Hand* for defendant.

OPINION OF THE COURT.

THIS is a motion for a new trial, reserved for a full bench.

The suit was brought by plaintiff, as indorsee of two promissory notes, dated September 1st, 1839, against defendants, as makers, under the firm of Charles Bissell & Co. It was in evidence, that the firm was dissolved October 29th, 1838, of which payees had personal notice, prior to the making of the notes. They were given for a debt due by the firm, by Bissell, without any authority from Comstock to use the partnership name. The following advertisement of the dissolution of the partnership was published, in the "Daily Advertiser" of Detroit, a paper of general circulation, October 31st, 1838: "Dissolution." "The co-partnership heretofore existing under the firm of Charles Bissell & Co., is this day dissolved by mutual consent. The business will hereafter be continued by Charles Bissell, who is duly authorized to settle all demands in favor or against said firm." "Detroit, October 29th, 1838. Signed, Charles Bissell, H. H. Comstock."

It is argued, 1. That the dissolution of the partnership

Cope et al. v. Romeyne and Pitts.

put an end to the power of Bissell to use the partnership name. *Bell v. Morrison*, 1 Peters, 370; *Gillet v. Atwood*, 2 Doug; Story on partnership, 458, 472-3-4; Gow, 253-4.

2d ground. That the terms in which the dissolution was announced to the public, did not authorize Bissell to use the name of his former partner.

The question is well settled in this country that, after the dissolution of a partnership, the partnership name can not be used, by either partner in the creation of a new contract. That power existed during the partnership, but its dissolution terminated it. The name can not be used in giving a note for a debt due by the late firm. For that would be a new contract, variant from that which was entered into, during the partnership.

This power to use the name of Comstock was, clearly not given in the notice of dissolution. It authorized Bissell, who continued the business, "to settle all demands in favor of or against said firm." But it did not authorize him to use the name of his late partner, in entering into a new contract. To settle, was to ascertain the balance due, and pay it, but not to give a note or any other obligation.

The motion for a new trial is granted.

COPE ET AL. v. ROMEYNE AND PITTS.

The mortgages may remove that which is not a fixture, and which was placed or constructed on the ground, after the mortgage was executed.

This is especially the case where the purchaser had no notice, and acted *bona fide*.

Mr. *Emmons* for plaintiffs.

Mr. *Romeyn* for defendants.

OPINION OF THE COURT.

THIS is an action of trover. A mortgage was given to the Bank of the United States on the 8th of April, 1840, to

secure the payment of the sum of ten thousand six hundred forty-one dollars and fifty-seven cents on lots fifteen, sixteen, and seventeen, in Port Sheldon, a town on paper only, by the Port Sheldon Land Company. An association was formed, called the "Port Sheldon Land Company," in Michigan, to lay out a town, build a steam mill, and to make other improvements. The assignees of the bank bring this suit. Before action was commenced on the mortgage, the trustees of the land company released the equity of redemption to the plaintiffs.

The loan was made to the company by the Bank of the United States, the 18th of April, 1838, which was negotiated by Mr. Jaudon, who was cashier of the bank, and was one of the land company. When the release of the equity of redemption was given, it was stipulated that the proceeds of the property should be applied in payment of the mortgage debt.

Mr. Jaudon being sworn, stated that he acted as agent for the land company, and in that character purchased an engine to put into a saw mill, which they had constructed on one of the lots mortgaged. That being in possession in 1843, as agent, and one of the land owners, he took down the engine and shipped it, with its apparatus, to Detroit, accompanied by a bill of lading, which was indorsed to Romeyn, and which he indorsed to the "Bank of Sinclair." Romeyn was authorized to sell the engine, and he did sell it to the Bank of Sinclair, and indorsed to it the bill of lading. Pitts purchased it for the bank, in good faith, without notice from Romeyn, the bank having made advances on the engine.

A bill was filed to foreclose the mortgage—defense withdrawn. No steps have been since taken on it. Mr. Jaudon says the release of the equity of the mortgage was released only on the condition that it should be in full payment of the mortgage, and the assignors so understood at the time of the assignment. The plaintiffs admitted, by a letter to Jaudon, 11th March, 1847, that the mortgage was limited to the lots expressed.

The counsel for the plaintiffs insist that the mortgagee, after forfeiture, may sue in trover for any part of the freehold, severed before or after the mortgage became due, though out of possession. 17 Eng. Com. Law, 272. Mortgagor is less than a tenant. The personal property, when severed, still belongs to the mortgagee. Admits that if the mortgager had sold the property, including the engine, the title would have been good. But he insists that, the engine being severed, a sale by the mortgager does not give a good title. Recording acts have nothing to do with the present question. 3 Wend. 104; 8 Ib. 584; Powell on Mort. n. 165; 2 Greenleaf, 387; 33 Eng. Com. Law, 115; 1 Doug. 21, 256; 15 Eng. Com. Law, 486.

The only question which is raised by the pleadings is, whether the engine could properly be claimed by the mortgagees?

At the time the mortgage was executed, there were no improvements on the lots. A saw mill was subsequently constructed. Now, it is admitted that all improvements, such as a saw mill, essentially connected with the freehold, could not be removed by the mortgagers. But was the engine so connected as to make it the property of the mortgagees? It was necessary to the operation of the mill, but was it so attached to the soil, as a fixture, that the mortgagees could not remove it? The mortgagees, after building their mill, were not bound to keep it in operation, or to repair it. They, having erected it, had a right to abandon it. Had the improvements been on the premises at the time the mortgage was executed, the mortgagees, by an action, might have turned them out of possession, or restrained them from committing waste. The mortgage debt was due at the time the mortgage was given.

But, if it be admitted that the engine was a fixture, and could not be severed from the freehold, that could not affect the right of the Bank of Sinclair. Pitts, the agent of the

Davis & Lockwood v. Bank of River Raisin.

bank, purchased it, without notice, *bona fide*, and the bill of lading was indorsed to him by Romeyn, to whom the engine was consigned. The bill of lading, in regard to the transfer of the property, like a bill of exchange, is good, unless affected by notice. And it is not pretended that there was bad faith on the part of the Bank of Sinclair, or that its agent had notice. We think, therefore, that as a matter of law, the above facts being admitted, the jury must find the defendants not guilty. On this intimation, a non-suit was suffered, and a motion was afterward made to set it aside, which the court overruled.

DAVIS & LOCKWOOD v. BANK OF THE RIVER RAISIN.

A bank which draws a bill in express violation of its charter, can not set up such bill in payment.

The bill is void, and must be so held in all transactions relating to it.

Mr. Romeyn for plaintiffs.

Mr. Noble for defendant.

OPINION OF THE COURT.

THIS is an action of assumpsit, the general issue being pleaded.

The defendants gave to the plaintiffs a draft of the Bank of Brest, for two thousand dollars. It was understood, at the time, that the draft was received by the plaintiffs, in payment of a debt due them by the defendant. The Bank of Brest was insolvent, and no part of the draft was ever received.

The plaintiffs contend, if the draft was received in payment, it could not operate as such, because the Bank of Brest was organized under the general banking law of Michigan, which the supreme court of the State has held to be unconstitutional. But if the bank was a corporation, the draft was void, it having been issued in express violation of the law.

George Elminger v. John Drew.

It is not material to inquire whether this Bank of Brest was organized or not. It is enough to know, that it was one of a large batch of banks established under a general law of Michigan, which was recommended to the popular sanction, and that numerous banks were organized under it, all of which turned out to be banks without capital. They were all subject to what was called the "safety fund act," which, by the 81st section, provided that "no moneyed corporation, subject to this act, shall issue any bill or note of the said corporation, unless the same shall be made payable on demand and without interest."

The draft in question was in violation of that law, as it was not made payable on demand. It was, therefore, an instrument which the corporation had no right to create, and being void, it can not be considered as payment to the plaintiff. And the court so instructed the jury, who found for the plaintiff. Judgment. 3 M'Lean, *Weed et al. v. Snow*, 265.

GEORGE ELMINGER v. JOHN DREW.

A partial failure of the consideration can not be set up as a defense to the note given on the purchase.

There are conflicting authorities on the subject; but the weight of authority is as above stated.

It was the doctrine of the Supreme Court when this case was decided.

Since that time, a different rule has been sanctioned by that Court.

Messrs. *Bates, Hand, Barstow & Lockwood, Douglass and Walker* for plaintiff.

Mr. *Fraser* for defendant.

OPINION OF THE COURT.

THIS is an action of assumpsit by the indorsee against the indorser of a note. The declaration contains eleven counts. The first count states that E. Morse & Co., made their promissory note on the 10th of March, 1838, for fifteen hundred

dollars, payable sixty days after date, to the order of defendant, at the office of the American Fur Company, in the city of New York; which note was assigned by the defendant to the plaintiff, was duly presented for payment, and protested.

The 2d count was substantially the same. The 3d count the same, and in addition, that the makers of the note, who were commission merchants, transferred to the defendants a large amount of merchandize to indemnify the defendant, for his indorsements, etc., and, therefore, that he was not entitled to notice, etc.

The 4th count was substantially the same as the third.

The 5th count, that the said Morse & Co., made their certain other note in writing, on the same day payable to the defendant, at the same place, four months after date, for eleven hundred and one dollars, which was indorsed by the defendant to the plaintiff, that at maturity the note was presented at the place of payment, and due diligence used, etc.

The 6th count states the making of the said note, payable to the order of the defendant, which was indorsed by him; and due diligence was used, etc., and that at the time the note was executed, a large amount of merchandize was transferred to defendant for his indemnity, etc.

The 7th count was substantially the same. The four following were the general counts:

The defendant pleaded, 1. The general issue. 2. That the American Fur Company are the owners of the notes sued on, which company is incorporated, and that some of the corporators reside in the district of Michigan. The third plea is to the same effect.

The 4th plea. That previous to the execution of the notes, E. Morse & Co. contracted with the American Fur Company to purchase a large quantity of white fish, at eight dollars per barrel; and that the company warranted the fish to be well cured, good, sound, and wholesome, on which six

hundred barrels were purchased, and that the notes were executed in part payment of the same, and avers that the fish were not well cured, but were bad, unsound, unwholesome, and of no value whatever. That the said notes were assigned to the plaintiff after their maturity, to wit, on the 1st of February, 1842, and at the place last aforesaid.

5th plea. That E. Morse & Co. purchased six hundred barrels of white fish, at eight dollars per barrel, from the company, who fraudulently and deceitfully and knowingly stated and represented to said E. Morse & Co. that the fish were well cured, good, sound, and wholesome that the same were unsound, etc., and of no value.

6th plea. That the defendant was a mere accommodation indorser on the notes. That the plaintiff by an instrument of writing, gave to Morse & Co. six months' time for a valuable consideration paid, for the payment of the notes, by which the defendant was discharged.

7th plea. That defendant was an accommodation indorser, and received no consideration therefor, that six week's time to the maker was given, after the notes became due, etc.

8th plea. That defendant was an accommodation indorser, and that six months' time was given, etc.

9th plea. That time was given, etc., for a valuable consideration, etc.

10th plea. That the promises in the 2d, 3d, 4th, 6th, 7th, 8th and 9th counts, were the same as set forth in the first and fifth counts, and that he received no consideration therefor, and that without the assent or knowledge of defendant, for a valuable consideration, time was given.

The plaintiff replies to the 2d plea that the notes were not the property of the Fur Company at the time stated in the plea, and tenders an issue.

To the 3d plea issue was joined. To the 4th and 5th pleas the plaintiff demurs, and assigns causes of demurrer. On these pleas the principal points arise on the pleadings. The defendants joined in demurrer.

The first cause of demurrer alleged "that the property was not returned or offered to be returned;" it is insisted by the defendant that it was not necessary to aver any such thing. Chief Justice Spencer says: "We know of no case in which there is an omission to return the article agreed to be sold which precludes the defendant from contesting the price on the ground that it was not returned to the vendor." See 18 John. Rep. 141; 17 Com. L. 878, 121, 291; 3 New Hamp. 455. And the counsel remark, it was held in the above case, "that though the defendant had not returned or offered to return the hats, she might in an action brought against her, nevertheless, insist on a deduction of the price originally agreed to be paid, in proportion to the diminished value." This, it is contended, is the settled doctrine in this country and in England. The rule is, as contended, "that if there is no beneficial consideration there shall be no pay." 1 Camp. 88, 190; Peake's Cas. 59, 216; 2 New Rep. 136.

A promissory note given on the sale of a chattel, fraudulently represented by the seller to be of great value, when in fact it was of no value, is without consideration and void. So where there is a warranty, and the return of the property is unnecessary; and it is insisted that it is immaterial whether the suit is brought on the original contract or on the security for the purchase money. Even a partial failure, if fraud intervene, is a good defense. 5 Mass. Rep. 46; 2 Taunt. 2; 1 Esp. R. 201; 1 Camp. Rep. 41 n.; Baily on Bills, 582, notes 7 and 8; 1 Mason, 439; 10 Mass. R. 415.

There is great conflict in the authorities, whether a partial failure of the consideration may be set up in defense, in an action on the note given for the purchase money. The authorities all agree that where there is a total failure of the consideration, it is a good defense; or where the parties have agreed upon the amount, the failure being partial, defense may be made. But where the question as to the extent of the failure is open, the weight of authority is against the argument of defendant's counsel.

The article purchased, six hundred barrels of fish, is alleged to have been badly cured, and of no value, and the warranty of the vendor was, that they were well cured, etc. But there is no averment in any of the pleas that the barrels are worthless, and it is difficult to say, that there is a total failure of the consideration. The barrels, at twenty-five cents each, would be worth one hundred and fifty dollars, which, it is true, is an inconsiderable amount when compared to the sum of four thousand eight hundred dollars, agreed to be paid for the fish; yet there is no rule by which the court or jury can limit a defense in such a case. The failure, if matter of defense, cannot depend upon the extent of it. If it be less than total, it must avail the defendant, to the amount of it, on principle, however inconsiderable it may be, when compared to the purchase money.

In the case of *Greenleaf v. Cook*, 2 Wheat. 13, the court say, "where a promissory note has been given for the purchase of real property, with full knowledge of the extent of an incumbrance, defect of title, arising from that incumbrance, is no legal bar to an action on the note." And they say, "that any partial defect in the title is not inquirable into in an action on the note in a court of law, but the party must seek relief, if any where, in chancery."

There may be cases in which, to set up a partial failure of consideration, would be attended with but little difficulty, and, in the language of Chancellor Kent, would avoid a circuity of action. But the question is, not what might be practicable in some cases, but what is the best and safest rule on the subject. I say this, because there are decisions both ways.

Now, where there had been a partial failure or defect of title, as in the above case cited from Wheaton, two issues would be presented; first, as to the execution of the instrument on which the action is brought; and, second, the extent of damage by the partial failure of title. Can both of these be sub-

mitted to the same jury; or would the defendant be required to admit the execution of the instrument, on pleading the partial failure? If this were adopted as a general principle, it would lead to embarrassment, if not uncertainty in pleading. A jury would not be the most competent tribunal to investigate an intricate controversy as to land titles; and if the partial failure had not been settled judicially, must the court and jury inquire into the title, and determine it? This would require another party to be brought before the court, who had no interest in the original suit. Such a course would be impracticable.

Where goods are sold and delivered with warranty, and a negotiable note is given in consideration of such sale and delivery, if the contract be absolute, such breach of it cannot be set up as a defense to an action on the security; unless the contract be rescinded by the consent of both parties, it remains open. Chitt on Con. 742, 743, note 495; 28 Wend. 114; 2 Hill's Rep. 293; *Thornton v. Wynn*, 12 Wheat. Rep. 183; 6 Conn. 508, 515; *Power v. Wells*, Cowper Rep. 818; *Weston v. Davis*, Douglas 28; 1 Term Rep. 185-6.

If the contract be yet open, the plaintiff's demand is for unliquidated damages, on a special contract of warranty; and the issue as to whether there has been a breach of warranty cannot be tried, except on a special action on the warranty. *Lewis v. Cosgrove*, 2 Taunton; Chitt. on Con. 465.

The case of *Oberl v. Bethune*, 22 Com. L. Rep. 363, enforces the distinction between an action for the price of goods and one brought on a security given, on the authority of *Morgan v. Richardson*, 1 Camp. 40; and *Tye v. Gwynn*, 2 Camp. 346, cases which the court say have always been acted on, and the court expressly applies the doctrine to cases where there has been a warranty. 19 Com. L. Rep. 121; 1 Term, 183; *Salemon v. Turner*, 2 Com. L. Rep.

The case of *Moggeridge v. Jones*, 14 East, 456, is a strong case to show that in an action on a note the rule is strict with

regard to letting in defenses founded on want of consideration. 25 Wend. 107.

In New York, the English rule that partial failure of consideration can not be shown in evidence in an action on a note, has not been observed. 8 Wend. 109; 25 Wend. 114; 12 Ib. 586; Story on Bills, 204; 17 Com. L. Rep. 121.

A partial failure can not be set up as a defense to the note given for the purchase money. 12 Wheat. 183; 19 Wend. 566; 5 Mass. 319; 18 Pick. 95; 1 Metcalf, 547; 2 Kent Comm. 480; 5 East, 449; 2 Barn. & Adolphus, 456.

The 5th plea sets up fraud and deceit, but does not aver an offer to rescind the contract by returning the property which, as appears from the plea, the defendants received, and still retains.

Fraud, undoubtedly, avoids a contract. But, whenever the purchaser retains the property, it is evidence, in law, that he abides by the contract; and it is consequently considered as binding between the parties. And the only difference between such a case and one of warranty is, that the party defrauded may, at his own option, rescind the contract in a reasonable time. To this there may be an exception where, from the circumstances, it is impracticable to return the property, as the death of a horse, etc., and in such a case a notice should be given to the vendor. 2 Taunt. 2; 12 Wheat. 153; 2 Hill, 292; 14 East, 486; 2 Kent's Comm. 480; 1 Metcalf, 547; Chitt. on Con. 679, 680, 743; 15 Mass. 319; 12 Wheat. 198; *Bleeker v. Vrooman*, 13 John. Rep. 302; 3 Peters's Rep. 215; *Scudder v. Andrews, et al.*, 2 McLean, 464. In the case above cited from 12 Wheat., the court say, "If the sale be absolute, and there is no subsequent consent to take back the article, the contract remains open, and the vendee must resort to his action on the warranty." But, in such a case, where there had been a total failure of the consideration, it might be set up in defense.

From the authorities cited on both sides, it will be seen, that courts differ as to the right of a defendant to set up a partial failure, in defense, to an action on the note given; but the weight of authority, especially in England, is against the right. And such I considered to be the established doctrine of the Supreme Court, as declared in 2 McLean, above cited. A very recent decision, not yet reported, in the Supreme Court, has overruled the cases in that court. But, as the light of that opinion was not given, until long after the decision of the case now before us, the decision must be reported as it was pronounced. In its entombment, this opinion will not be dishonored; for it will repose, at least as regards the decision of the above point, by the side of the opinions of illustrious judges.

The 6th plea avers that the defendant indorsed the note for the accommodation of E. Morse & Co., the makers, and without consideration; and that the plaintiffs, for a valuable consideration, agreed with E. Morse & Co., without the assent of the defendant, to extend the time of payment, etc.

The replication traverses the averment that the defendant indorsed for the accommodation of E. Morse & Co., and avers, that he received a valuable consideration therefor, and denies the agreement to extend the time of payment, etc.

To this replication the defendant demurs, for duplicity in traversing both the averments, that the defendant was an accommodation indorser, and the averment that time was given.

It is admitted to be a rule of pleading, where, on one side it consists of several distinct and material facts, all of which are necessary to its legal sufficiency, the adverse party is allowed to traverse only one of them. A denial of either of them in law is an answer to the whole. A denial of more than one of such distinct and material points, is duplicity. *United States v. Cumpston*, 3 McLean, 163; Gould's Pl. 406, sec. 49.

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The averment in the plea, that the defendant was an accommodation indorser, as regards the extension of the time of payment, could be of no importance. If the time were extended, for a valuable consideration, as alleged, the indorser is discharged, whether he was an accommodation indorser, or indorsed for a valuable consideration. That allegation in the plea may be considered as surplusage, for in no point of view, as regards the extension of time, raised in the plea, could such allegation be of any importance. Story on Bills, sec. 191; *Brown v. Mott*, 7 John. Rep. 361.

To avail himself of the fact of his being an accommodation indorser, the defendant must aver and prove, that the plaintiff gave no value for the notes, or took them over due. He will be presumed to be a holder for value, unless the contrary be made to appear. 8 Phil. Ev. 447; *Swift v. Tyron*, 16 Peters's Rep. 16; *Bramah v. Roberts*, 27 Com. L. Rep. 464.

The demurrer to the above replication is overruled. The demurrers to the fourth and fifth pleas are sustained. Leave given to amend the pleadings of either party, etc.

J. F. COOPER v. GIBBS & GORDON.

An accepted draft will not be considered in payment of an indorsed note, unless there was an express contract that it should be so received.

Notice to indorsers is sufficient, if it describe the note so that the indorsers must know it, and state the payment was demanded and protest made, and that the holders look to the indorsers for payment.

If time be given, for a valuable consideration, the indorsers are discharged.

Mr. *Hand* appeared for plaintiff.

Mr. ——— for defendants.

OPINION OF THE COURT.

Gentlemen of the Jury:—

THIS suit is brought by the indorsee against the indorsers

of the following promissory note: "Six months after date I promise to pay on the order of George O. Gibbs, James S. Sanford and J. Wright Gordon, two thousand two hundred and fifty dollars, with interest, for value received, at the office at the North American Banking and Trust Company, in the city of New York." Signed, Sidney Ketchum. Indorsed by the payers in blank.

The note was not paid at maturity. Stephen Merrihew, of the city of New York, a notary, was sworn as a witness, who stated that at the maturity of the note he presented it for payment, at the North American Bank and Trust Company, in the city of New York, and finding no funds in the bank to pay it, he protested the note for non-payment, and gave to the indorsers the following notice: New York, 3d July, 1839, \$2250 00. Gentlemen—Please to take notice, that a promissory note, made by Sidney Ketchum, for two thousand two hundred and fifty dollars, with interest, indorsed by you, is protested for non-payment, and that the holders look to you for payment thereof. Signed, Stephen Merrihew, Notary Public, and directed to George O. Gibbs, Jas. S. Sanford, J. Wright Gordon, at Marshall, Michigan.

1st ground of defense. This notice is objected to as insufficient. We think it contains all the requisites of a good notice. In the first place, it describes the note with such certainty as not to be mistaken by the indorsers, and they are informed that it was protested for non-payment, and that the holder will look to them for payment. Nothing more than this was required. The signatures are printed, which is proved to be the mode of signing in New York. 2d ground of defense. That the note was paid. Sidney Ketchum being sworn, states that the defendants were accommodation indorsers. The note was not paid by him, and the witness does not know that it would do to say it was paid. Witness was in New York, and Ogden informed him if he would get a good acceptance he would take it for the note, and witness proposed

the name of Schuyler, a flour dealer, then in New York city. Ogden said he would inquire into the circumstances of Schuyler, and in a day or two he told witness that he would take the acceptance. Witness procured the acceptance, went to Ogden's office, found him absent. Ogden's clerk took the acceptance, and, on calculation, found it overpaid the note about fourteen or fifteen dollars, witness thinks, and the clerk paid to witness the balance at the time. Witness requested the delivery of the note, but the clerk declined giving it, saying that Ogden would return in a few minutes, and witness had better speak to him on the subject of the note. Ogden advanced some money to the plaintiff, and was the holder of the note now sued on, at least one-half of the amount of it, and he received it for collection. Ketchum called on witness and inquired whether witness would take a good acceptance in payment of the note. Witness said he would. The acceptance of Schuyler was offered. Witness made inquiry as to his responsibility, and could ascertain nothing. Then he informed Ketchum that he could not take the acceptance in payment of the note, but would receive it and any thing else in the shape of security, and would apply any payments in discharge of the note. The acceptance was taken on these conditions. Witness instructed his book-keeper to apply any payments, made on the acceptance, in discharge of the note. The acceptance was for \$2350. The note was for \$2250. The acceptance dated 6th July, 1839; interest up to that time \$80 07; interest for sixty days, the time of the acceptance, \$57, making the sum of \$2367 07, from which deduct \$37 there will be left the sum \$2330 07, for which the acceptance was drawn. The thirty seven dollars were paid by Ketchum. Witness never agreed to give up the note on the receipt of the acceptance; but gave Ketchum to understand that he would not receive the acceptance in payment; that he received it as security. The plaintiff afterward took up the note, paying witness the amount advanced by him.

Mr. Ketchum speaks with much hesitancy, gentlemen, in regard to the payment of the note by the acceptance. Indeed, he does not say when the acceptance was handed to Ogden, that it was received in payment. He requested of the clerk the delivery of the note, but he declined giving it, and referred the witness to Mr. Ogden. And on his suggestion, witness permitted the note to remain in his hands until the acceptance was due. If the acceptance was given in payment of the note, it was a discharge of it as fully as if the money had been paid. And if this had been done, the note would hardly have been left in the hands of Mr. Ogden. The fact of retaining the note, with the assent of Ketchum, until the acceptance was due, would seem to imply that the note was not considered as discharged by the accepted draft. If by this the note were paid, it could be of no value in the hands of Ogden, or of any other person, who had notice that it had been paid.

The statement of Mr. Ogden, who has no interest in the transaction, is explicit, that he informed Mr. Ketchum the draft would not be received in payment of the note, but as security; and that any amount paid upon it should be applied in discharge of the note. And the note, after the delivery of the acceptance to Ogden, being left in his possession, is corroborative of his statement. It will be for the jury to pass upon the fact of payment. To make the acceptance a payment of the note, it must be made clearly to appear to the jury, that it was so received. It seems that the suit which had been commenced on the note, was discontinued on the acceptance being given. And the second acceptance was given for the same amount as was due on the note. There was some money paid at the time the acceptance was renewed. This money, Mr. Ketchum says, was paid to him by the clerk; but Schuyler and Ogden both say the money was paid by Ketchum. Ogden says that he was not satisfied with the responsibility of Schuyler.

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That time was given for the payment of the money, which releases the indorsers, is the third and last ground of defense.

Was the acceptance given for, or on account of, the note? If it were so given, as a security, it did not postpone an action upon the note. To discharge the indorsers, there must be a valid agreement between the holder and maker of the note, to postpone the payment for some time. And to have this effect, witness says that Ogden said he believed Schuyler was good, but he would rather that witness would leave the note until the acceptance became due, for the reason that he had no interest in the matter—was doing business for others; to which witness assented.

Witness was arrested in New York, on the note, and was required to give bail, unless the suit should be settled. Ogden agreed with witness that he would receive an acceptance in payment of the note; and the acceptance was given, and the suit was settled. Ogden is reputed to be a lawyer in New York. Witness has been sued on the note in Michigan. The acceptance has never been given up. It was, witness thinks, payable in sixty days. It was due before witness was again sued on the note, a year or more. At the time Ogden agreed to take a good city acceptance, and when the acceptance was taken, nothing was said as to what should be done with the note.

At the time the acceptance was given, and ever since, witness has been greatly embarrassed; thinks he gave but one acceptance. Witness is positive that at the time the acceptance was given, a sum of money was paid to him, which was the amount the acceptance exceeded the note. Schuyler had no assets of witness.

Schuyler says, on or about the 4th of September, 1839, witness accepted a draft drawn by Ketchum, payable to his own order, for two thousand three hundred and fifty dollars, payable in sixty days. It was indorsed to Ogden. This draft became due about the 6th of November, following.

Witness accompanied Ketchum to Ogden's office, where Ketchum gave Ogden his draft or note indorsed by witness, for the above amount, and took up the first acceptance. Witness was able to pay the amount when the second draft became due. Ketchum paid some money on the renewal of the acceptance.

It must be an agreement, as if suit should be commenced before the time agreed upon, a Court of Chancery would enjoin the party from prosecuting the suit. And such an agreement must be founded on a valuable consideration.

Such an agreement may be proved by parol or by writing, and must have been so expressed as to be understood by the parties. Such an agreement does an injury, in a legal point of view, to the indorsers. They have the right to pay the note to the legal holder, and be subrogated into the rights of the holder, to prosecute the makers of the note. But if he has made such a contract with the holder, as to prevent any action from being brought on the note for a given time, this right of the indorsers is impaired, and they are consequently relieved from responsibility.

If the acceptance was not received in payment, but was received with an express agreement that there should be no proceeding on the note until the acceptance become due, the defendants are discharged. The holder of the note was not bound to sue the maker, but he discharged the indorsers if he made a contract, founded on a valuable consideration, that he would not sue for a given time. And if, as a condition to the giving of the acceptance, the holder agreed to wait until the acceptance became due, the defendants are discharged.

Whether there was such an agreement, is for the jury to determine. If there was a contract of this import, it must have been made with Mr. Ogden, the witness. All that is pretended to have been done in regard to the acceptance was done by him; he, in fact, at the time, being the holder of the note, owning one half of it, and having it in his hands

for collection. And Ogden, from general recollection, says that he made a general agreement with Ketchum respecting the note, except what he has stated on his examination, that on taking the acceptance there was no agreement to give time. If you find for the plaintiff, you will give interest on the note; if for the defendant, your verdict will be general.

Jury could not agree, and were discharged.

GILTNER V. GORHAM, ET AL.

It is under the Constitution and Act of Congress only, that the owner of a slave has a right to reclaim him in a State where slavery does not exist.

There is no principle in the common law, in the law of nations, or of nature, which authorizes such a recaption.

A parol authority by the master to his agent, is sufficient to authorize a seizure of a fugitive from labor.

To make a person liable for a rescue, in such a case, he must act "knowingly and willingly."

But this knowledge that the colored person is a fugitive from labor, is inferable from circumstances.

To every one who mingles with the crowd, it is not necessary that the agent should state on what authority he proceeds.

It is enough that he states it generally.

And one of a crowd, who interposes by manual force, or by encouraging others, by words to rescue a fugitive, is responsible.

But he does not make himself responsible where he endeavors to allay the excitement, and prevent a breach of the peace.

The agent, in seizing a fugitive from labor, acts under the sanction of law, no warrant being necessary.

Distinct trespassers can not be joined in the same action.

Where a rescue is made by the continuous action of a crowd, any one who took a part in the course of action is responsible, and may be sued with others who participated at a different time in the same action.

A female fugitive from labor, having had a child during her residence in a free State; on an action for her value, and the value of her husband, etc., on a charge of rescue against the defendants, the court held, as the child was not claimed in the declaration, the question whether the claimant had a right to it and a control over it, was not necessarily involved in the case.

A witness can not be discredited by proving that he made a certain remark, which in his examination he does not deny, but can not recollect.

An expression by the agent of the plaintiff, that he should not pursue the slaves, is no abandonment of his right of action.

A witness who stated a falsehood, which probably does not arise from mistake or misapprehension, will not be believed by the jury in other parts of his evidence unless corroborated.

Messrs. Platt and Norvell appeared for plaintiff.

Messrs. Emmons, et al. for defendants.

OPINION OF THE COURT.

THIS action is brought to recover the value of six slaves claimed by the plaintiff, a citizen of Carroll county, Kentucky, who, having absconded from the service of the plaintiff, were arrested by his agents in the town of Marshall, in the State of Michigan, and who were by the defendants and others rescued, by reason of which their services have become lost to the plaintiff.

The second section of the fourth article of the Constitution declares, that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

By the third section of the Act of 1793, respecting fugitives from labor, it is provided, that when a person held to labor in any of the United States, and under the laws thereof, shall escape into any other of the said States, the person to whom such labor is due, his agent or attorney, may seize or arrest any such fugitive, and take him before a judicial officer, who shall require proof that the claimant is entitled to the services of the fugitive. Upon proof being made, such officer shall give a certificate, etc. And the fourth section provides, that "when any person shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, when so arrested," etc., "or shall harbor or conceal such persons, after notice that he or she was a fugitive from labor as aforesaid, shall for either of said offenses forfeit and pay the sum of five hundred dollars, etc., saving, moreover, to the person claiming such labor or service, his right of action for or on account of said injuries or either of them."

Were it not for these provisions in the Constitution and the Act of Congress, every slave who escaped, by whatever means, from the State where he is held in bondage to a State or Territory where slavery is not allowed by law, he would be free. There is no principle of the common law, or of the law of nations, which would authorize his recaption. To avoid this consequence, and preserve the harmony of the States, the above provisions were adopted.

Where the slave absconds, the master may reclaim him. But where the slave is taken to a free State by the master, or goes there with his assent, the slave can not, within the meaning of the constitution, be said to be a fugitive from labor, and consequently the master can not reclaim him. This shows that slavery exists only by the municipal law, and that beyond the operation of such law, there is no right of reclamation in the master, except that which is expressly given to him by law: and he must pursue the mode authorized to make the remedy effectual.

There are four counts in the declaration. Two, with some variation, charge the defendants with hindering the arrest, and two charge them with having rescued the slaves after they had been arrested.

Francis Troutman, a witness, states that he is the grandson of the plaintiff; that he knew the six slaves named in the declaration, and that they absconded from the service of the plaintiff, in Carroll county, Kentucky, in August, 1843. In the fall of 1846, the plaintiff having been informed that the fugitives were in Marshall, in the State of Michigan, authorized the witness to search for and arrest them, and bring them to Kentucky, calling to his aid such persons as should be necessary. December 23d following, he arrived at Marshall, and finding the slaves there, he wrote to the plaintiff to send persons who could aid him, and who could identify the slaves. After this, witness left Marshall, and did not return until the 26th of January, 1847. David Giltner, son of the plaintiff, William F. Hord, and James S. Lee, persons sent from Ken-

tucky to his assistance, met him at Marshall, and having procured the services of Dickson, the deputy sheriff of the county, early on the morning of the 27th they proceeded to the residence of the slaves. Dickson accompanied them to keep the peace. As they approached the house, Adam Crosswhite and his son Johnson, two of the fugitives came out of the door and proceeded in different directions, apparently with the intention to escape. They were followed, and on being requested, returned to the house.

The witness entered the house, and told the family he had come as the agent of Giltner to arrest them as his slaves, and to take them before 'Squire Sherman to prove that they belonged to the plaintiff. On this, Adam attempted to leave the house, but witness prevented him. The witness requested the family to get ready to go before the magistrate. Some preparation was made, when Adam inquired if they were to be taken off without a trial. Witness informed him they should have a fair trial, and the best counsel he could procure. Adam said the weather was cold, and that the family could not walk to the house of the justice. Witness replied, that a wagon should be procured to convey them.

The witness permitted Adam to consult counsel, and he went to another part of the village, accompanied by Dickson, for that purpose. Witness remained in the house with the family. Before Adam's return, several colored persons and some white ones came to the house. Planter Morse, a colored person, and one of the defendants, entering the house, declared the family should not be taken. He was much excited, and pulling off his coat, declared he would go into the fight. He advised Adam, on his return, not to be taken, declaring that he and others would stand by him, and drive off the kidnappers. Adam then went to a drawer, took out of it something which witness supposed to be a knife and powder-horn. Morse drew a knife, and using it in a menacing manner, declared what he would do with it, if witness attempted to take the family away.

About this time, five other persons came to the house, one white man and a boy, the others colored. Hacket, one of the colored men, came near to the witness, who was standing in the door, and inquired what he was doing. Witness replied that he was doing what the law authorized him to do. Hacket said he would see about that, and attempted to pass into the house. Witness told him to stand back. Hacket's hand was in his pocket. Witness again told him to stand back, drawing a pistol which he retained in his hand, but did not present it in a firing attitude. Hacket retired, saying he would attend to witness.

James Smith, a colored man, and one of the defendants, approached, and in an excited manner inquired where the Kentuckians were, who were attempting to kidnap the Cross-white family. The witness was pointed out to him, and Smith, with a club raised, approached within five or six feet of witness, when he was seized by Dickson, who, with the aid of one or two other persons, led him away. Smith, as he approached witness, threatened to smash out his brains.

Charles Berger, a colored man, and a defendant, approached, and in an excited manner inquired where the Kentuckians were, and, as witness thinks, drew a knife, the handle of which he saw, and which he used in a threatening manner. Dickson interfered and led him aside, though he still remained on the ground.

William Parker, a colored man, and also a defendant, came up with a gun, and declared he would risk his life to prevent the Crosswhite family from being taken.

By this time one hundred or more persons, white and black, had collected. Threats against the lives of the Kentuckians were made, if they persisted in taking the fugitives. They were denounced as kidnappers, and some proposed to tar and feather them—others to massacre them.

About this time Charles T. Gorham, Herd and Combstock, defendants, came on the ground, with Easterly, at first made

defendant, but as to whom the suit is now discontinued. This was about eight o'clock in the morning. A large crowd had assembled, who uttered a good deal of menace. The whites encouraged the blacks. Easterly said something, when Gorham said to the witness, "You have come here after some of our citizens." Witness replied that he had come as agent of Giltner, the owner of the slaves, to take them before a justice, with the view to establish the right of the plaintiff to their services. Gorham replied, "You can't have them, or take them: this is a free country, and these are free persons." Either at his suggestion or the suggestion of the witness, they walked aside, when Gorham advised witness not to take the negroes, and demanded his authority. Witness stated it, and Gorham then remarked, "There is a great deal of danger in making the attempt to take them;" and added, "we will not allow them to be taken."

At this time the wagon to convey the family was driven near the house, when witness, after again stating his authority, declared he would take the fugitives before the justice. Combstock, one of the defendants, then said, "You can not have the negroes." Witness, looking him full in the face, inquired why they could not take them. Combstock, pointing to the crowd, said, "You see that in making the attempt your lives will be endangered;" and added, "you can't have them, or can't take them, by moral, physical, or legal force; and you might as well know it first as last, and the quicker you leave the ground the better for you."

Gorham took up the remark of Combstock, a short time after it was made, and offered the following resolution:

"Resolved, That these Kentuckians shall not take the Crosswhite family by virtue of moral, physical, or legal force."

This was passed by general acclamation, and with much noise. Witness then said, taking a book from his pocket, that he wanted the names of all responsible persons who

intended to prevent him from taking the slaves. Gorham said he came there by public sentiment, to prevent his taking the slaves; that public sentiment was above the law; that similar attempts had proved abortive; and we will not permit our citizens to be kidnapped and taken back to slavery. This was before he offered the above resolution.

When witness called for names, he addressed himself to Gorham and Easterly. They both gave their names, and Gorham requested that his name might be put down in capitals; and he requested witness to bear it back to the land of slavery as a moral lesson; and he added, that he wanted to make an example of witness. Combstock also gave his name in full, *Oliver Cromwell Combstock, jun.*, adding the junior, he said, that his father might not be held responsible for his acts. These three were the only names taken by witness. Gorham said he was responsible, and Combstock requested witness to inquire of his neighbors as to his responsibility.

Witness, standing in front of the house, requested Dickson to summon Gorham, Combstock, and others, to assist in keeping the peace, while he should seize the negroes to take them before the justice. Some of the slaves were in the house, others among the crowd. Dickson, and the friends of witness, seemed to think that nothing more could be done.

After Gorham's resolution, as witness thinks, he asked the privilege to offer a resolution:

"*Resolved*, That I, as agent of Francis Giltner, of Carroll county, Kentucky, be permitted peaceably to take the family of Crosswhite before Sherman, a justice, that I may make proof of property in the slaves, and take them to Kentucky."

Witness heard no votes for the resolution, at least not more than one or two.

Witness then proposed that if they would permit him to take the slaves before the magistrate, and if he should prove the right of the plaintiff to their services, and obtain the certificate, he would give them time to raise money to pay for

the slaves a reasonable price; and he proposed to contribute more than any other man. Gorham replied, "You can't have a sixpence for them, and you can't take them."

Again witness requested Dickson to summon the above persons to assist in keeping the peace. Gorham then said, "Hold on, and we will see whether we will let you take them to the magistrate's office." Gorham, Herd, and Easterly seemed to be in consultation a short time. When it was ended, Herd, standing outside of the gate, in the presence of Gorham, a few rods in front of the house, offered the following resolution:

"Resolved, That these Kentuckians leave town in two hours."

Here some one of the crowd added, "or they shall be tarred and feathered, and rode on a rail"—when Herd continued, "or they shall be prosecuted for kidnapping or house-breaking."

Prior to this, witness had been arrested on a warrant on complaint of Hacket, but was permitted by Dickson, who served the warrant, to remain on the ground. A warrant was made out by witness, and signed by Sherman, to arrest the slaves, which was placed in the hands of Dickson. This was done to prevent resistance. But Dickson refused to execute the warrant. He served the warrant on the witness, issued on the oath of Hacket, and being advised by Dickson and others that he could not, by reason of the crowd, take the negroes before the Justice, and that it would not be safe to attempt to do so, he desisted. Before witness left the ground, Dickson several times declared that he must take him before the Justice, as commanded by the warrant. A second process was issued against him for a trespass in breaking the fastening of Adam's door.

After breakfast, witness was taken before Squire Hobart and went into trial on the trespass case, which continued until 9 or 10 o'clock in the evening, and was then adjourned

until next morning, Gorham was present next morning, and observed to witness, "your negroes are gone." Witness replied, that he had been told so, and observed he would give one hundred dollars if they were in the town. Gorham replied, "if you will say two hundred dollars we will have them brought back." He said that he would not place the negroes in the possession of the witness, but would return them to their house, and no white man should interfere. Witness refused to enter into the proposed agreement. A judgment of one hundred dollars damages and costs, was entered against the witness by the Justice in the trespass case.

On the morning of the 29th, as witness and his Kentucky friends were about leaving, at the National Hotel, in Marshall, Herd, Gorham, and others being present, witness said to Gorham, "you have all got the advantage of me now," but he could not tell how it would end. Gorham said, "yes, the negroes are gone, and you can never get them."

The witness estimates the value of the negroes at two thousand seven hundred and fifty-two dollars.

Harvey W. Dickson states, that he was deputy sheriff, and was requested by Troutman to accompany him in arresting the slaves, to keep the peace. On entering the house of the negroes, Troutman explained to them that he had come as the agent of Giltner to take them before a magistrate, to prove property, and then take them to Kentucky. Cross-white consented to go—told the family to get ready—put a cloak round his little girl—said that it was cold, and that he did not wish to go without a wagon. Troutman said a wagon should be procured.

Afterward witness's attention was called by Troutman to the fact that Adam was arming himself. Morse was there at this time. Troutman prevented Adam from going into the cellar. Witness next observed Hacket, a white man and a boy—heard Hacket ask Troutman what was going on. Troutman replied that he had business there, etc. Hacket

attempted to come into the house. Troutman, standing in the door, forbade him; but he continued to approach until Troutman drew something out of his pocket, which witness supposed to be a pistol; and Hacket turned about and went off.

Smith came up with a club, and inquired where that kidnapper was who had drawn a pistol on Hacket—was shown Troutman—approached him with his club, but was stopped by witness and led away.

Witness then saw Berger approach with a stone, that would weigh from four to six pounds, and said he would smash Troutman. About this time witness went to town with Adam, to consult about his case, and returned in half an hour. When he returned, there were from one hundred to one hundred and fifty persons collected—heard Troutman call for responsible names. Gorham requested him to “put down his name in capitals, and bear it back to the land of slavery, as an evidence of the example we intend to make of you.” Witness refused to execute the warrant to arrest the negroes, handed to him by Troutman. He should have attempted to execute it with great reluctance, by reason of the excitement.

On being requested, Troutman stated to Gorham, that he acted as the agent of Giltner, who owned the negroes, under the Act of 1798. Gorham said they did not care about an Act of Congress: “the dear people are the law, and you can’t have the negroes.” Witness, at the request of Troutman, summoned Gorham, Herd, and others to assist in keeping the peace. Combstock asked witness for his warrant, before or after he gave his name in full to Troutman. Gorham offered the following resolution:

“*Resolved*, That we will not permit these Kentuckians to take the slaves, by moral, physical, or legal force.”

The ayes were called for, and the resolution passed with one or two dissenting voices.

Troutman then offered the resolution as stated by him, which was unanimously rejected. Witness did not see Combstock on the ground at this time. Herd, one of the defendants, then offered a resolution :

"Resolved, That these Kentucky gentlemen, if such they may be called, leave here in two hours, or we will take them with a warrant for trespass or house-breaking." Some one added, "Or we will tar and feather them, and ride them on a rail."

Troutman then offered a resolution :

"Resolved, That we adjourn to meet at two o'clock," observing, "and you will find me on the ground."

Shortly after this the crowd dispersed. Before leaving the ground, a warrant was put into the hands of witness, by Hacket, against Troutman, charging him with an assault and battery with intent to kill. Witness must have had this warrant two or three hours before the adjournment, during which time Troutman considered himself in the custody of the witness; and as an excitement was getting up against witness for not executing the warrant, he stated the fact to Troutman, and told him that he must go before the justice. Troutman remained in the custody of the witness until the next day.

Witness heard Troutman say the next day, that he would give one hundred dollars if the negroes were in the village. Gorham observed, "If you will give us two hundred dollars, we will bring them back—not to deliver them to you—but we will put them in the house they occupied, and every white man shall keep away; and then if you can take them, you shall have them."

Before the first visit to the house of the fugitives, witness called there as a tax collector, to take an assessment of property, persons, etc., his object being to ascertain whether the family were there.

Charles W. Lusk was on the ground at about eight o'clock. There might have been fifty, sixty, or one hundred persons

present, among whom were from fifteen to twenty colored persons. There was great excitement. Smith, one of the defendants, a colored man, had a club in his hand, and said he intended to walt some of the Kentuckians. Witness entered the house a few minutes—saw in it Adam, his wife, and several of the children. There were some white persons in the house. When he came out of the house, he observed the crowd had increased. Every one seemed to take an interest in the Crosswhite family, and it was said in the crowd that the Kentuckians would be sorry enough for their efforts. Witness saw Gorham, Comstock, and the other defendants, in the crowd. Troutman stated his authority to the crowd, and that he wished to take the negroes before Justice Sherman, to prove them to be the property of Giltner. In other matters, the witness corroborated the statements of Troutman. Twelve other witnesses corroborated the statements of Troutman in several particulars.

David Giltner, the son of the plaintiff, identified the fugitives, and stated that they belonged to his father. At the request of his father, he came to assist Troutman, and was accompanied by Ford and Lee. These men, his father informed him, were employed to assist, and would meet him at a certain place. At that place the witness met them, and they accompanied him, as they had agreed with his father, the witness paying their expenses with money advanced by his father for that purpose.

Being in the crowd at Marshall, and hearing the threats made against Troutman and the Kentuckians generally, the witness said if there was to be an attack on any person, he hoped it would be on him, as he was most interested in recapturing the slaves; and he also remarked, if by force they should be prevented from taking the negroes, that he would bring a regiment from Kentucky, and would take them.

The evidence of the plaintiff being closed, witnesses were called by the defendants.

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Troutman asserted that he had rights there, and the people had prevented him from carrying them into effect. Gorham replied, "you see that the people have taken the law into their own hands. They consider the negroes as citizens. There was an excitement in the crowd, to impress any one with the apprehension of danger." Gorham did not seem to be excited—he treated Troutman politely. Gorham said this was not a mob: it is composed of men of character.

Witness saw Combstock talking with Troutman near the house. Combstock asked Troutman for his authority. Troutman said he did not need any authority. "Then," said Combstock, "you can't take the family away." Troutman inquired, "what is your name, sir?" Combstock replied, "Elihu Chamwell Combstock, jun. Give it or write it in

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at which time there were present six or seven white persons and eight or nine negroes. Troutman, Giltner, and the other Kentuckians were on the ground. He heard Giltner say, if they shall refuse to let us take the slaves, we will bring a regiment from Kentucky and take them.

Hearing a conversation between Troutman and Gorham, he approached them. Troutman said, "I understand you to say that I shall not take the slaves." Gorham replied, he had not said so, but he supposed Troutman would be satisfied from the crowd that he could not take them. Gorham said they were not abolitionists—advised Troutman not to make an attempt to take the fugitives, as it would cause great excitement. Gorham evinced earnestness, but he was good natured.

In one or two instances, Gorham exerted himself to allay the excitement. Dickson called on witness, Gorham, and others to assist in taking the slaves. He had a warrant, but after this he made no attempt to take them.

Combstock asked Troutman what he was going to do. He replied that he was going to take the slaves. Combstock replied, "it is evident from the excitement you can not take them." Troutman asked Combstock for his name. He gave it. Troutman said he did not want the slaves, if he could get names who were responsible. Troutman then said, "I understand you to say we shall not take the slaves." Combstock replied, that he had not said so, but remarked, "you ought to know from the appearance here that you can not take them by moral, physical, or legal force." Soon after this, witness left the ground with Combstock. He heard no resolution offered. There must have been about one hundred and fifty persons on the ground.

In the course of his examination, this witness to impeach Dickson was asked, "whether Dickson did not admit to him that he might have called Gorham and others to assist in taking the negroes?" In his examination, Dickson said he

had no recollection of having done so. But the court refused to permit the question to be asked, as it did not contradict the witness Dickson. His statement of a want of recollection, is not a ground to discredit the fact of recollection not being ascertainable.

Twenty-four witnesses were examined, who corroborated, more or less, the facts and circumstances stated by the two preceding witnesses.

From the facts proved, there seems to be no doubt of the right of the plaintiff to the services of the fugitives. Giltner identifies them as the slaves of his father, and Troutman does the same. And there is nothing in the evidence or in the circumstances of the case, which casts the least doubt on this right.

The agency of Troutman and those associated with him, seems also to be established. It is proved by Troutman and by Giltner. The former was authorized to call to his assistance such persons as he should deem necessary, and those who acted with him were so called. And in addition to this, the plaintiff sent his son, and Messrs. Ford and Lee, to assist him. This is as clear a proof of agency as could be expected in any case.

In the case of *Driskill v. Parish*, 8 M'Lean, 631, doubts were suggested whether such an agency could be constituted by parol. But that was a case where a written power was given, and it was not produced on the trial.

We suppose that a parol power must be held to be sufficient. This is a common law principle, and the statute, which authorizes the agency, does not require it to be in writing.

From the witnesses of the defendants, as well as those of the plaintiff, there would seem to be no doubt Troutman arrested the fugitives, and that they were rescued from his possession and control. When he entered the house and communicated to Adam and his family that he came as the

agent of Giltner to take them before a justice, to prove the service they owed, and to take them back to Kentucky, Adam yielded, and considered himself and family under his control. He left his family in the house with Troutman and others, and went into the village, under the care of Dickson, to take counsel.

It was not until after the crowd assembled, became excited and showed a determination to resist the claim of the agent of Giltner, that Adam and his family saw a prospect of escape. Indeed the counsel for the defendants admit there was a rescue, and that it was not in the power of Troutman and his assistants, to take the fugitives before the justice. The rescue of the slaves enabled them to escape to Canada, beyond the reach of the claimant.

As there was an arrest, the jury can disregard the two counts in the declaration for hindering an arrest. If they shall find for the plaintiff, it will be under the two counts for a rescue.

The rescue is not only clearly proved, but admitted, consequently only two questions remain for the decision of the jury. Are the defendants guilty? and if guilty, what amount of damage is the plaintiff entitled to?

There is, as might be expected, a great difference among the witnesses as to the number of the crowd. It was hastily collected, under circumstances of great excitement. The estimate of the witnesses varies from one hundred and fifty to two hundred and fifty. Some of them suppose there might have been three hundred. Now to subject any one of that crowd to an action for the rescue of the slaves, it is not necessary to show that he used manual force, or conveyed the fugitives beyond the power of the claimants. Being present in the crowd, if by words or actions he encouraged others to make the rescue, he is responsible.

It may be that the respectable persons which formed that assemblage acted under a mistaken view of the law, but this

constitutes no justification or excuse. The injury of the plaintiff is the same, whether the acts complained of were done by a good motive or a bad one. The actors proceeded on their own responsibility, and they cannot now escape from it. Such assemblages are dangerous to the public peace and to private rights. Impelled to action by the most reckless, the crowd lose sight of individual responsibility, and are led to commit atrocities from which, as individuals, they would shrink with horror. Hence the danger of commingling with such a crowd, except as peace-makers and to prevent mischief. From the evidence it seems that many of the most orderly and respectable citizens of Marshall were found at the house of Crosswhite. And so far as they may have been induced to go, to protect the rights of the colored persons in question from an illegal seizure, their motive is not to be condemned. But when they were informed, by the principal agent, Troutman, that the seizure of the negroes was only for the purpose of taking them before a justice, to prove that they owed service to Giltner, there was no excuse for opposition founded in law or in conscience. That man is a dangerous citizen, who follows his conscience in violation of the legal rights of others.

Troutman, as the agent of the plaintiff, was in pursuit of a legal right—a right sanctioned by the fundamental law of the Union—and his conduct under the emergencies was characterized by forbearance and a respect for the law. He was armed, but, as it seems, only for self-defense.

There are seven defendants, and the jury will apply the evidence to each.

It is insisted that the jury can not find a general verdict of guilty against all the defendants, unless they all participated in the same act at the same time. That those who may have done acts which made them responsible at the first assemblage of the crowd, can not be connected whatothers, who subsequently did other acts which make them responsible.

Distinct trespasses, it is admitted, can not be joined in the same action. But such is not the case under consideration. The act was continuous. The declaration charges a rescue, and that was accomplished by the crowd, in a course of proceeding of more than three hours. Threats were used, weapons were brandished by certain colored individuals, resolutions were passed, evincing a final determination by the crowd not to suffer the fugitives to be taken before the justice. Now, it may not be possible to point out any particular act, standing alone, which effected the rescue; but when we look at the course of action, we see that it was done. In this respect the acts of the multitude are inseparable, and responsibility attaches to each individual who participated.

Planter Morse, one of the defendants, entered the house of Crosswhite not long after Troutman entered it, and in a most violent and excited manner, declared that he would oppose the taking of Adam and his family; and he advised them not to be taken, and gave an assurance that he and others would stand by them. This, if you believe the witnesses, identifies this defendant with the rescue.

A question is made whether this and some of the other defendants had notice that Adam and his family were fugitives from labor. The words of the act are, when any person shall "knowingly and wilfully" hinder an arrest of the fugitives, or rescue them after they shall have been arrested. In the case of *Driskill v. Parish*, 3 M'Lean, 681, it was held, "that no one incurs the penalty under the act of Congress, for 'hindering or obstructing an arrest,' who does not act 'knowingly.'" And the same principle applies in the case of a rescue. To bring an individual within the statute, he must have knowledge that the colored persons are fugitives from labor, or he must act under such circumstances as show that he might have had such knowledge, by exercising ordinary prudence.

Morse is not proved to have been present when Troutman

communicated to Adam and his family, that he came to claim them as the agent of Giltner. He came, it is believed, shortly after this announcement was made; and of which he might have been informed had he inquired of the inmates of the house, or of those who were at that time present.

In a free State, every human being is presumed to be free, without regard to color, until the contrary is proved. The presumption is said to be against the freedom of a colored person in a slave State. These were circumstances sufficient to put Morse upon the inquiry whether Adam and his family were not fugitives from labor. And the same remark applies to the other defendants. It was not necessary for Troutman, on the approach of every individual, to proclaim his authority and object. It was enough that he stated them once, and more than once, to the crowd.

Charles Bergen, another of the defendants, approached Troutman, drew his knife, and used it in a menacing manner, until he was led aside by Dickson. And William Parker, also a defendant, came to the crowd with a gun, and declared he would risk his life to prevent the Crosswhite family from being taken. James Smith, also a defendant, coming into the crowd, inquired where the Kentuckians were who were attempting to kidnap the Crosswhite family. Troutman being pointed out to him, he approached within six feet of him, raising a club, when he was seized by Dickson, who, with the aid of one or two others, led him away.

None of the witnesses, it is believed, state anything which contradicts these facts, and, if the jury believe them, they would seem to be conclusive as to the guilt of the above defendants.

In regard to the defendants Gorham and Combstock, there is some contrariety in the evidence. This difference exists in regard to certain facts, and as to the order of time at which they occurred.

From the statement of Troutman, and several other witnesses who corroborate him, it would seem that Combstock first declared "the slaves could not be taken by moral, physical, or legal force;" and that shortly afterward, Gorham adopted the same sentiment, which he offered to the crowd in form of a resolution, that was passed by acclamation. Gorham is also represented as saying that public sentiment was above the law, and that the people had taken the law into their own hands, and that he came there in obedience to public sentiment, to prevent the slaves from being taken. These statements were made by some six or eight of the plaintiffs' witnesses.

A still greater number of the defendants' witnesses represent the facts somewhat differently. They say that Troutman opposed the first resolution, and that no resolution was offered by Gorham. Some of the witnesses say that to Troutman's resolution, "that he might be permitted to take the slaves," Gorham offered an amendment, "if he shall take them legally." The resolution said to have been offered by Gorham, identified him with the illegal movement; but if he offered no resolution, and merely proposed the amendment to Troutman's resolution, as above stated, that act, disconnected with others, did not implicate him.

And in regard to the declaration of Combstock, that "you can't take the slaves by 'moral, physical, or legal force,'" many of the defendants' witnesses say, it was a remark made wholly in reference to the public feeling, and not as a wish or determination of the defendant to prevent such a taking. On the contrary, it is said, that he referred to the excitement of the crowd, and its expressed determination, not to permit the slaves to be taken; and that his motive was, manifestly, to preserve the peace, and prevent blood-shed. It appears Combstock arrived on the ground somewhat late, and remained only a short time.

That the facts which transpired in an excited crowd, should

be differently related by different witnesses, was to be expected. Differences, under such circumstances, do not necessarily authorize an imputation against the motives of the witnesses. The confusion and excitement of the crowd, must have prevented witnesses from hearing distinctly and comprehending the movements of persons most actively engaged. It is proper that I should say of Troutman, the leading witness for the plaintiff, that considering the circumstances under which he was placed, he bore himself with moderation and excellent temper. To the taunts and abuse which were thrown out against him and his associates, by inconsiderate individuals in the crowd, he made no reply, but sustained himself with a manly firmness.

The credibility of witnesses rests with the jury. You will decide where witnesses differ, which is entitled to belief. It will be your duty to reconcile statements which seem to be contradictory, if they can be reconciled. The manner and bearing of witnesses in their examination, are entitled to great consideration where there is a conflict.

If from the whole evidence it shall appear that Gorham and Combstock, and Herd, the other defendant, went upon the ground with the view to preserve the peace, and they nor either of them while on the ground said nor did anything to excite the crowd to oppose the seizure of the fugitives for the purpose avowed; and especially if the tendency of their acts was to allay the excitement without encouraging the rescue of the fugitives, they are not guilty as charged in the declaration. But, on the contrary, if their conduct on the ground had a different tendency, if they said or did anything by resolutions or otherwise to encourage the crowd in their illegal acts, the defendants are guilty. Of this, gentlemen, you are the exclusive judges. The respectability and high moral bearing of these defendants, will not in the least excuse an illegal act, which is injurious to any one.

It seems that since the residence of the fugitives at Mar-

shall, a child was born by the wife of Adam, and the court are requested to instruct the jury that the plaintiff had no right to the child, or through his agents to take it to Kentucky. Nothing is claimed for this child in the pleadings, and no question in regard to it is necessarily involved in the case.

In this action, as in every other where damages are claimed for a wrong done, the wrong must be clearly proved—so proved as to satisfy the minds of the jury.

We are requested to say to the jury, if a witness swear falsely in one particular, he is not to be believed in any. This must depend on the nature of his relation. Should the jury believe that a witness swears falsely, deliberately and corruptly, they may and should place little or no confidence in any other part of his evidence, which is uncorroborated by other witnesses. But if the mis-statement is the probable result of mistake or misapprehension, the jury will not regard it further than as showing an inaccuracy of memory or judgment. The jury, therefore, in weighing the evidence, will judge of it under all the circumstances connected with it. The belief of a witness, resting upon facts within his own knowledge, is evidence; but his belief is not evidence where it rests upon facts not within his knowledge. The direct pecuniary interest of a witness in a case, however small, renders him incompetent; and any other connection of agency or relationship to a party, may go to his credibility.

In this action, the plaintiff claims the value of the slaves in damages. For a rescue, as also for hinderance on arrest of fugitives from labor, and for harboring or concealing them, the act of Congress gives a penalty of five hundred dollars; but, beyond this, the statute saves to the party injured an action for damages. Under this provision this action has been brought; and if the jury shall believe that the defendants, or any part of them, aided and assisted in the rescue, as before stated, the jury will find the whole of the defendants, or a part of them guilty, as the facts may author-

ise. There can be no doubt, that by reason of the rescue, the fugitives escaped to Canada. The value of their services, which has been proved by two or three witnesses, with little variations in their estimates, is the loss which the plaintiff has sustained.

Any expressions of Troutman, that he should not pursue the fugitives, does not show a relinquishment of this right of action. It seems to have been an expression of abandonment of the claim, imposed upon him by a necessity which he could not control.

This, gentlemen, is an important case. It involves great principles, on which in a great degree depend the harmony of the States, and the prosperity of our common country. The case has acquired great notoriety by the action of the Kentucky Legislature, and of the Senate of the United States. It is the first one of the kind which has been prosecuted in this State.

The defendants' counsel, to some extent, have discussed the abstract principle of slavery. It is not the province of this court, or of this jury, to deal with abstractions of any kind. With the policy of the local laws of the States, we have nothing to do. However unjust and impolitic slavery may be, yet the people of Kentucky, in their sovereign capacity, have adopted it. And you are sworn to decide this case according to law—the law of Kentucky as to slavery, and the provisions of the constitution, and the act of Congress in regard to the reclamation of fugitives from labor.

This provision of the constitution is a guaranty to the slave States, that no act should be done by the free States to discharge from service in any other State, any one who might escape therefrom, but that such fugitive should be delivered up on claim being made. This clause was deemed so important, that, as a matter of history, we know the constitution could not have been adopted without it. As a part of that instrument, it is as binding upon courts and juries as any other part of it.

The chief excellence of our institutions consists, not so much in our written constitutions and laws, as in the moral power which they embody. Intelligent foreigners are more forcibly struck with this great fact than with any other. They see no military array—no display of martial music, or men-at-arms, to attract and intimidate; and they inquire, where is the government? It is neither to be seen nor felt, and yet the people are quiet and orderly. Foreigners seem to have no adequate conception of that moral power which unseen pervades every part of our country. Under itsegis our citizens repose in confidence, as to the safety of their persons and property. If injured in either, they look for redress to an energetic and enlightened execution of the laws. And from this does moral power emanate. Laws the most wise and wholesome, if not carried into effect, can be productive of no good. They will remain on our statute books as monuments of reproach.

If we wish to give permanency to our government, and preserve its great principles, we must stand by the constitution and laws; and in the administration of justice, especially, we must give effect to them. In the law is found the only safe rule by which controversies between man and man can be decided. In no supposable case, has a juror a right to substitute his own views, and disregard established principles of law. A well instructed conscience is a proper guide for individual action; but when we are called upon to act upon the interests of others, we violate our oaths, and show ourselves unworthy of so important a trust, when we adopt, as a rule of action, our own convictions of what the law should be, rather than what it is.

The jury, after being out all night, returned at the opening of the court the next morning, and declared they could not agree, and they were discharged.

At the succeeding term a verdict was given for the plaintiff for the value of the slaves.

Judgment.

CIRCUIT COURT OF THE UNITED STATES.

OHIO.—JULY TERM, 1848.

FOSSITT & Co. v, BELL.

A bona fide holder of a negotiable note, indorsed before maturity, holds it free of any claim by the maker against the payee. If indorsed after maturity, the indorsee takes it at his risk.

L. being solvent, and the debtor of F. & Co. without their knowledge procures and indorses the note of B. his debtor, and places it in the hands of G. to be held for the benefit of F. & Co., and G. holds it in his hands till it is past due, and then delivers it to F. & Co.—held, that B. can not in a suit by F. & Co. on this note, set off the note of L. to H. indorsed by H. to B. after the maturity of the note held by F. & Co.

In the absence of all circumstances warranting a presumption of fraud, the indorsement to F. & Co. takes effect from its actual date, and not from the date of its delivery to F. & Co.

Mr. *Taffe* appeared for the plaintiffs.

Mr. *Brush* for the defendant.

OPINION OF JUDGE LEAVITT.

THIS suit is brought on a note drawn by the defendant for \$1,174 41, payable to Britton Leming, or order, twenty days after date, dated 2d of February, 1847, and indorsed by Leming to the plaintiffs.

The defendant has pleaded a set-off to this note, in substance as follows: that before the indorsement of the note to the plaintiffs, Leming was indebted to Bell, in the sum of \$750, on a note dated 1st of May, 1847, payable to E. Holmes one day after date, and in the further sum of \$750, on a note

dated 1st January, 1847, payable to said Holmes, the 1st of June in that year, both indorsed to Bell by Holmes.

The matter in controversy between these parties is, whether these notes constitute a legal set-off in the present action. And this depends wholly on the date of the indorsement of the note on which this action is brought. It is very clear, if the plaintiffs became the owners of this note for a good consideration, before its maturity, and without notice of any off-set against it by the defendant, the latter can not avail himself in this action of Leming's note to Holmes, indorsed by Holmes to him.

It is well settled, that the *bona fide* holder of a negotiable note, indorsed before it is due, holds it clear of any claim in favor of the maker against the payee, existing before or at the date of the indorsement. In such a case, the remedy of the maker is against the payee. The reverse of this principle obtains, if the note is indorsed after maturity. Then the indorsee takes it at his own risk, subject to any demand in favor of the maker against the payee.

It will be for the jury to decide the question of fact, involving the actual date of the indorsement of the note in question. It would appear from the evidence, that this note became the property of the plaintiffs under the following circumstances, as set forth in the deposition of Joseph R. Gitchell. He testifies, that in January, 1847, Leming sent for the witness ; that he went to Leming's house, and found him sick and confined to his room. Leming expressed a wish to secure certain creditors, and especially the plaintiffs in this suit. And for this purpose transferred, for the special benefit of the plaintiffs, an account against the defendant, amounting to \$1,300, executing at the same time an order for the payment of the account to them. The defendant, it seems, recognized this transfer, and on the 1st or 2d of February, 1847, paid in cash on the account transferred for the security of the plaintiff, the sum of \$185, and gave his note, payable to Leming, for the

balance, \$1,174 41. This is the note on which this suit is brought—it bears date 2d of February, 1847, and is payable in twenty days. Leming, on that day indorsed the note in blank and delivered it to Gitchell for the use and benefit of the plaintiffs. Gitchell acted as the friend and agent of plaintiffs, but without any previous understanding or conference with them in regard to this transaction. He states, that the note was delivered to the plaintiffs or their agent, in the beginning of May, 1847.

From the evidence before the jury, there seems to be nothing disclosed impeaching this transaction as fraudulent. Leming, who was a *bona fide* debtor of the plaintiffs, evinced a proper desire that they should be paid, and for this purpose transferred his claim against Bell, as before stated. Subsequently, on the 2d of February, 1847, Bell gave his note for the balance then due on that account, payable to Leming or order, in twenty days, and this note on the same day was indorsed by Leming, and placed in the hands of Gitchell, to be held by him for the benefit of the plaintiffs. There is no evidence that Leming was, at this time, insolvent or even embarrassed in his circumstances; and there is, therefore, no ground to presume an intention on his part, to give a fraudulent preference to the plaintiffs over the other creditors. Nor is there any pretense that he was not justly indebted to the plaintiffs to the amount of this note.

If the jury are satisfied that the note on which this suit is brought, was fairly indorsed to the plaintiffs, on the 2d of February, 1847, and on that day became the property of the plaintiffs, through the agency of Gitchell, though not delivered to them till the beginning of May following, it will result, from the principles of law before laid down, that they are entitled to a verdict for the amount of the note and interest.

The notes of Leming to E. Holmes, insisted on as a proper matter of set-off against the plaintiffs' claim, were indorsed by Holmes to the defendant on the 1st of May, 1847—more

M'Lean, Assignee, v. Lafayette Bank.

than two months after the maturity of the note indorsed by Leming to the plaintiffs. These notes can not, therefore, be set off in this suit. It would seem, from the evidence, that they were transferred to the defendant upon the condition that they could be set off against the note on which this suit is brought. From this, it is to be inferred that the defendant entertained doubts whether they could be so used, at the time they were transferred to him. He has no ground of complaint that they do not constitute a set-off in this action. By the terms of the agreement between the defendant and Holmes, the former has a clear right to return the notes to Holmes; or, if he prefers that course, he can seek his remedy by suit against Leming. In either case, he will not be a sufferer.

Verdict for the plaintiffs.

M'LEAN, ASSIGNEE, v. LAFAYETTE BANK.

Where a mortgage is given on land and personal property, and other liens are set up to the personal property, the court will direct the real estate to be first sold. But if it should be insufficient to discharge the mortgage, the lien on the personal property will be enforced, it being prior to the others.

When a judgment is appealed from the Common Pleas to the Supreme Court, the judgment below remains a lien on the real estate of the defendant, in the county, and it would seem that the accruing interest and costs and penalty ought also to be considered as an incident to that judgment.

A mortgagor is not responsible, without notice, for the application of any surplus which may remain on the sale of the mortgaged property, after satisfying his mortgage.

Mr. Gholson appeared for the plaintiff.

Mr. Chase for the defendant.

OPINION OF THE COURT.

FROM the case of *M'Lean, assignee, v. The Lafayette Bank and others*, 3 M'Lean, 619, it appears that the bank loaned to John Mahard & Co. fifteen thousand dollars, to be paid in three equal annual installments, with interest. A

mortgage on real property was given to secure the payment of this loan, on the 7th of December, 1841. About a month after the mortgage was given, Mahard transferred forty-nine shares of stock to the bank, as collateral security, for the payment of the first installment of the above loan. On the 18th of April following, Mahard, on the same paper on which the assignment of the stock had been made to the bank, indorsed "the forty-nine shares of the stock are transferred to John S. Buckingham, for value received."

This last transfer was made on the supposition that the real estate would pay the fifteen thousand dollars. But the court held in the above case that the assignment to Buckingham was void under the bankrupt law. And they directed the real property to be first sold, under the mortgage, which has been done, and the proceeds do not pay the above loan. And the question now is, whether the transfer of the stock to the bank, remains a lien to pay the first installment.

The court, on the principle that the bank held two liens, directed the real estate to be sold first, and applied to the discharge of the fifteen thousand dollars loan. But this did not affect the lien of the stock, and was not intended to affect it, if the real estate should prove insufficient to pay the above loan. In their opinion in the original case, the court say, "the final disposition of this stock is reserved until the proceeds of the mortgage shall be realized." And in the concluding part of their opinion, they say, "the transfer by Mahard, of the forty-nine shares of the stock of the Lafayette Bank, having been made to John S. Buckingham, on the 18th of April, 1842, but little more than one month before the petition in bankruptcy was filed, and under a knowledge of the above facts, must be held as void under the bankrupt act."

As the transfer of this stock to the Buckinghams was declared to void, under the bankrupt law, by the court, the stock must be considered as held under the valid transfer, preceding that to Buckingham, to the Lafayette Bank. This

stock was intended to secure, to the extent of its value, the first installment of the fifteen thousand dollars loan, and the court will now direct that it shall be so applied.

Exceptions are taken to the report of the master by the Lafayette Bank, as to the judgment of the Bank of the United States, and as to interest allowed on the Franklin Bank debt.

1. That the original judgment of the Bank of the United States, was recovered July, 1841, for \$2728 63, from which an appeal was taken to the Supreme Court, when the Bank recovered a second judgment, 4th April, 1842, for \$2837 84 damages, and \$141 89 penalty and costs of Supreme Court. And it is contended that the judgment for the penalty can only operate from the date of its rendition. The penalty was imposed under a statute by the Supreme Court, and can not be considered as a part of the judgment of the Common Pleas, as the amount could not be known to that court, nor to any one before the judgment of the Supreme Court.

That an appeal bond was given which would secure the penalty and costs in the Supreme Court. And this penalty and costs in the Supreme Court, it is argued, can not constitute a lien as a part of the judgment of the Common Pleas.

This is a small point to be brought up at this stage of the proceedings, in a case which involves numerous and intricate questions of lien covering a large estate. There is, undoubtedly, plausibility in the grounds taken, and it is not stated the Supreme Court of the State has ever decided the question. It could only arise where liens had intervened after the rendition of the judgment in the Common Pleas, and before the judgment in the Supreme Court. That happens to be the case in the present instance. And the counsel contends that the addition to the judgment, by adding the penalty and costs in the Supreme Court, should not attach to the original judgment which constitutes a lien, but should be thrown upon the securities on the appeal bond.

There seems to be no reason why the accumulating interest should not be included in the judgment of the Supreme Court as an incident of the judgment below; and the costs of the Supreme Court and the penalty which it annexes are a consequence of the appeal. As such sums must generally if not uniformly, be small, it is presumed they have been considered as partaking of the character of the first judgment. As against the defendant there can be no objection, and as against the opposing lien holders, I suppose that such has been the course. It may not have been considered of sufficient importance to make the question before the Supreme Court, and I do not feel disposed in the present case, under the circumstances, to allow the exception; it is, therefore, overruled.

2d exception. Can interest be allowed on a debt of the mortgager to the mortgagee after the mortgagee has purchased, at judicial sale, the property mortgaged to an amount sufficient to satisfy the debt? If the purchase money does not equal the debt, must not the interest stop on the amount of it, whatever it may be?

So soon as the sale shall be confirmed and the purchaser has a legal right to enter into the possession of the property, the interest on the mortgage money must cease, because the amount bid is payment. But when sales are ordered by a Court sitting in Chancery or Bankruptcy, the mere sale is not a title until it shall be confirmed by the court, and a title ordered to be made. For until that time, the bidder at the sale is not considered the owner of the property. The counsel for the Franklin Bank, however, admits the above exception, and of course, it must so stand.

3d exception. The counsel for the Lafayette Bank, claims that the Franklin Bank must pay a pro rata proportion of the amount of the judgment of the Bank of the United States, except the penalty and interest. The facts on which this position is founded are: The judgment of the Bank was

rendered July term, 1841. The mortgage of the Franklin Bank on lots 404 and 460 was recorded October 18th, 1841. The mortgage of the Lafayette Bank on the country property January 18th, 1842. And the judgment on the appeal was entered April term, 1842.

On the 8th of March, 1842, the Franklin Bank assented to the sale of Mahard to Dyer, released to him all her interest in the part sold; and agreed with him to indemnify him against the judgment of the United States Bank. Of the price paid by Dyer \$10,000, the Franklin Bank received \$7,297 33, the balance, \$2,702 67, was paid to the Buckinghams, with the assent of the Franklin Bank. The Buckinghams had, according to the adjudications made in this case, no valid liens on any of the property: as all the incumbrance of their judgments was prior to that of the Lafayette Bank, and that of their mortgage on lots 404 and 460 junior to that of the Franklin Bank.

And it is contended, that this being the state of facts, prior to the mortgage to the Franklin Bank, that corporation acquired, as against Mahard and the Bank of the United States, a right in equity, to compel the latter institution to resort to lands then unincumbered, for the satisfaction of its judgment; or in case the judgment should be satisfied out of the mortgaged property to have the judgment assigned to it and its lien on the property preserved for its benefit. And when the Lafayette Bank took its mortgage on the country property, it acquired a similar right, as between itself on the one side, and Mahard and the Bank of the United States on the other. And it is contended that the right of the Franklin Bank remained the same after the mortgage was taken by the Lafayette Bank as before.

The Franklin Bank has no right to throw the judgment of the Bank of the United States upon the property mortgaged to the Lafayette Bank. Every mortgagee must inquire before taking a security, not only what mortgages and

assignments bind the particular parcel proposed to be mortgaged, but also what mortgages bind every other part of the mortgager's estate. And from these premises the counsel concludes that the judgment of the United States Bank should be paid, *pro rata*, by the whole property which it bound. And he insists that the Franklin Bank, at most, could do no more than throw the Bank of the United States' judgment over on the Lafayette Bank property, so far as is necessary for its own protection. That if the property and other securities was sufficient to pay its own debt and also the Bank of the United States' judgment, it could not by any arrangement, throw that judgment upon the property mortgaged to the Lafayette Bank to favor junior liens.

It is admitted that when an individual is about taking a mortgage or other security, it is incumbent on him to ascertain whether there are not other and paramount liens on the same property. And if in this respect he shall be negligent, he must suffer the consequent loss. But it is apprehended that the principal contended for is not the one just stated. It is not the acquisition of a lien, but an abandonment of one. The complaint against the Franklin Bank is, that it was content to receive a part of the consideration for which one of the lots mortgaged to it sold, and consented that the residue of the purchase money should be otherwise appropriated; and the question is, whether by so doing it rendered itself liable to account for the whole amount of the consideration for which the lot sold.

The general principles of equity argued by the counsel, may be admitted, and yet, it is supposed, they can not apply to the case before us.

The same argument was pressed upon the court in the original case; and the court then said, "Those general principles must be admitted, but they can only apply where notice was given to the first mortgagee of the subsequent liens, as in case of a mortgage to secure future advances:

and there is no proof of actual notice in this case. The Bank in its answer denies notice, and constructive notice from the recording of the subsequent mortgages is insufficient. It appears that the balance of the consideration was paid to the Buckingham, who were subsequent mortgagees. *Guion et al. v. Knap et al.*, 6 Paige 85; *Nelson's Heirs v. Boyce*, J. J. Marshall 401; *Sharras et al. v. Craig & Mitchel*, 2 Condensed Rep. 411."

The reason of this rule is apparent. The Franklin Bank looks to the property covered by its mortgage for payment, and that being received, not knowing that there are junior mortgagees whose rights may be affected, is indifferent as to the appropriation of the surplus. A notice, then, which puts the party on his guard, is essential to make him responsible; and of so much importance is this notice, that it must be actually given, and not by the recording of a mortgage which determines the lien.

The above exceptions are overruled.

MILLER v. GAGES.

The indorsement on the writ, required by the state statute, which has been adopted, may be objected by a motion to quash the writ.

In such case an amendment would be permitted.

A neglect to make the indorsement is no ground for a plea in bar.

A plea in abatement is the only one that could be filed.

Mr. *Perry* for plaintiff.

Mr. ——— for defendant.

OPINION OF THE COURT.

THE defendant in this case cravedoyer of the writ, set it forth, and demurred to the declaration. Several causes of demurrer are assigned, but the variance assigned between the indorsement on the writ and the declaration, being the only one relied on, will be noticed.

The statute adopted in our practice, requires the clerk to indorse the cause of action on the writ, without prescribing any form. An indorsement, therefore, which shall state the cause of action in general terms, will be a compliance with the law. As this is a requisite of the statute, it may constitute a ground of objection to the writ, where the indorsement is not made. The most appropriate manner of taking advantage of a neglect to make the indorsement would seem to be by a motion to quash the writ. On such a motion the court would, of course, permit an amendment of the writ to be made.

A defective indorsement might be pleaded in abatement, by craving oyer of the writ; but it is no ground for a plea in bar. The demurrer is overruled, and leave given to amend the writ.

ODENHEIMER v. HANSON ET AL.

Whatever subterfuges may be resorted to to defeat the claims of creditors, a court of chancery will reach the property conveyed or covered.

As between the individuals who have concocted the fraud, chancery will not interfere.

Circumstances, in such matters, are sometimes strong enough to stamp the transaction with fraud, although against the oaths of the parties concerned.

Messrs. *Hunter and Stanbery* for complainants.

— — — for defendants.

OPINION OF THE COURT.

At a former term a decree was entered between the present parties, in which a conveyance of ninety-three and three-fourth acres of land conveyed by A. V. Taylor, one of the defendants, to Miles Hanson, another of the defendants, was held to be fraudulent and void against the complainant, who

had obtained a judgment against John Hanson, the land being his property, he having conveyed it to Taylor in fraud of creditors; and the conveyance from Taylor to Miles, the son of John Hanson, being with full notice of the fraud, and he being a participator in it.

The only point which remained unsettled by the former decree was, as to the ownership of six hundred dollars which Taylor received from Miles Hanson, on the conveyance to him of the above tract of land.

From the investigation in this case, John Hanson, his son Miles Hanson, and A. V. Taylor, have been held to have acted fraudulently in the transfer of the land, to defeat the claim of the plaintiff, and the only question now is, whether the sum in controversy belonged to John Hanson or his son Miles. Taylor having received the money from Miles, on the fraudulent conveyance of the land, is liable to account for it to the complainant, as a creditor of John Hanson, if the money was advanced by him. Neither John Hanson nor his son Miles could recover the money from Taylor, as no court will ever interpose its authority to settle a matter between *particeps criminis*. They are left as between themselves, where their own fraudulent acts have placed them.

But a court of equity, in such a case, will interpose in behalf of creditors, and for their benefit, reach the property which has been fraudulently covered, and unjustly withheld from them.

The original bill charges, that prior to the sale of the above tract, by Taylor to Miles Hanson, John Hanson, "in his own right held a promissory note on John Greenwood, of the city of Columbus, for six hundred dollars, loaned by him to said Greenwood," etc. The answer to the bill by Miles Hanson avers, "that on the 11th February, 1842, he paid said Taylor one hundred and fifty dollars in cash, and gave him a note on John Greenwood for six hundred dollars, which note was given by him to John Hanson. That the note of Green-

wood did not belong to his father but to him. That previous to the date of said note, he had laid by the sum of six hundred dollars, and preferring to have it in responsible hands, he sent it to Columbus by his father, who placed it in the hands of John Greenwood, who drew a note payable to his father, which his father, so soon as he returned from Columbus, indorsed to him. The bill charges that the said Taylor fraudulently obtained possession of said note and appropriated it to his own use.

John Hanson, in his answer, denies that he had any interest, equitable or otherwise, in said note, at the time it was assigned to Taylor.

It is proved that John Hanson loaned the money to Greenwood, and took the note payable to himself, no statement being made or intimated at the time, that Miles Hanson had any interest in it. And at the same time the note was executed, seventeen dollars interest was paid to John Hanson, due on sums which, being united, made up the amount of six hundred dollars, for which the note was given. The statements in regard to this money, given by John Hanson and Miles, are not consistent with each other, nor with the statements made at different times by themselves.

The land purchased did not belong to Taylor but to John Hanson as this court have determined, and this purchase being fraudulent, it is by no means probable, that the money paid by Miles was his own. He had a full knowledge of the transaction, and it is unreasonable to suppose that he would pay six hundred dollars on a fraudulent contract. The fraud was concocted between the three defendants, with the view of defrauding the creditors of John Hanson; he was most interested in putting the property beyond their reach. The payment to Taylor was made to cover the fraud, and the presumptions arising from the facts are strong that the money as well as the land, was furnished by John Hanson. He loaned it as his own, received interest on it, which was an

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important element in the deliberate fraud that was committed. The acts in regard to the land are so connected that the transaction can not be viewed as a whole, without coming to the conclusion that the whole was fraudulent. In the nature of things, one part, the conveyance of the land, could not be fraudulent, if the money was paid by Miles Hanson. But he acted fraudulently, as we have already determined, and connected together as the parties were, it would seem to be impossible, that a matter in which the fraud consisted, should, in any one of its parts be *bona fide*. We are satisfied that the money paid for this land by Miles Hanson to Taylor was advanced by John Hanson. And the question that remains is, whether Taylor, who has appropriated it to his own use, shall be held to account for it to the complainant. Taylor has paid no value for it, as the land on which it was paid did not belong to him, but to John Hanson. The money paid, equally with the land, we think, belonged to John Hanson, and is liable to the claims of his creditors. We shall, therefore, decree that the six hundred dollars and interest thereon, from the time it was received, shall be paid to the complainant in days, and on failure to pay, that execution shall issue, etc.

DOE EX DEM. C. CHINN v. DARNELL.

An entry of land within the Virginia military district of Ohio, and a survey of the same before the extinguishment of the Indian title, is made void by certain acts of Congress.

A person having such a claim is entitled, having a patent, to compensation for his improvements such as the occupying claimant law, he having acted in good faith.

Mr. *Stanton* appeared for plaintiff.

Mr. *Lawrence* for defendant.

OPINION OF THE COURT.

THIS is an ejectment to recover possession of a tract of land in the Virginia Military district, between the Little Miami River and the Sciota. The lessor of the plaintiff claims under a patent dated 30th of January, 1827. The entry was made in July, 1819, and the survey was executed in 1821.

The defendant's patent was dated 14th of April, 1806. His entry was made 16th November, 1798, and the survey was executed 2d of April, 1799.

The entry, survey and patent, under which the defendant claims, being of older date than the patent under which the lessor of the plaintiff claims, the counsel allege that the entry survey and patent of the defendant were void, as the entry was made on the land whilst it was Indian Territory.

By the proclamation of Congress, at Princeton, the 12th September, 1783, "all persons were prohibited from making settlements on lands inhabited or claimed by Indians, without the limit or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims, without the express authority and direction of the United States in Congress assembled."

By the act of the 3d of March, 1793, it is made a penal offense to treat with any Indians for the purchase of land. The same penalty is imposed, a thousand dollars, on any one who, without a license, shall settle upon the public lands by the act of 19th May, 1796.

By the intercourse act of the 30th of March, 1802, and 5th sec. that any person who shall make a settlement upon Indian lands, and who shall survey or attempt to survey such lands, or designate any of the boundaries by marking trees, or otherwise, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

By the Indian Treaty at the rapids of the Maumee, on the 29th September, 1817, a large tract of land was ceded to the

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United States, within which the land in controversy was situated. It seems, then, that any entry made within this territory prior to the above cession was prohibited by law, and, of course, no right could be acquired against law. The court, therefore instructed the jury to this effect.

The jury found defendants guilty, etc.

On motion, the court held that the defendant was entitled to relief under the occupying claimant law.

DOE, EX DEM. SPRAGUE ET AL. v. JOHN LITHEBERRY.

The court of common pleas have the power to appoint guardians, and also guardians *ad litem*.

A guardian may waive process, and enter his appearance for his wards.

Temporary absence from the county does not affect the jurisdiction of the court, in the appointment of a guardian.

The domicile of the infant is always presumed to be that of its mother.

The place where its parents lived and died, and its property remains, is presumed to be the proper place for the court to make the appointment.

The signature of the judge to the record, is not necessary under the statute.

A court has the power to make amendments *nunc pro tunc*.

The case still being continued on the docket, and the counsel presumed to be in court, no notice of an amendment was necessary.

It supplied the defect, by the delinquency of the clerk.

After the lapse of twenty-three years, when a great change has taken place in the value of the property, courts require clear ground to set aside the proceedings from which titles emanated.

Parol proof, after so great a lapse of time, not admissible to show that the minors were residents of Clermont county, and not of Hamilton.

We can not have before us the evidence that was before the common pleas, when the guardian was appointed.

Every presumption is in favor of the proceedings of a court having a general jurisdiction.

Messrs. *Gholson Miner* and *Fishback* for plaintiffs.

Messrs. *Fox*, *Gwynne* and *Chase* for defendant.

OPINION OF THE COURT.

THIS action is brought to recover possession of certain lots of ground in the city of Cincinnati.

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Deed from Steubens Harpers to Joseph Seaman, dated the 29th October, 1806, for the premises in dispute. Deed from Seaman and Steubens to Samuel Harpers, on the same day, signed by Seaman. Deed from Joseph Seaman to H. Hafer 20th August, 1813, for five acres, a part of the land. Deed from Joseph Carpenter, dated 18th August, 1813, to H. Hafer for five acres. Deed from William Cooper to Henry Hafer, 26th May, 1813, for twelve acres and sixty-two hundredths.

It was proved that Henry Hafer died in 1825, in Cincinnati, and left three children, two daughters and a son. The eldest daughter died in 1832, leaving Caroline and Henry surviving. Hafer was in possession, two or three years, and claimed the property until his death. The property was improved and was situated in the Eastern Liberties, and one of the witnesses says that Hafer was in possession five years.

Caroline married A. Sprague, one of the lessors of the plaintiff, and lives in Kentucky.

The defendants claim under an administrator's sale of the premises.

A certificate was given in evidence under the seal of the Court of Common Pleas, of Hamilton county, showing that Griffen Yeatman was appointed guardian of Caroline and Henry.

Letters of administration were granted to Francis Kerr, on the estate of Hafer.

A record was offered in evidence, showing a petition by the administrator, stating the debts due by the estate of Hafer and that there was no personal property out of which the debts could be paid, and praying an order for the sale of real estate, etc. Griffen Yeatman, the guardian, acknowledged notice.

This record was objected to, because it does not appear to be a final record, and was not signed by the judge.

The Court admitted the record saying, that from the

nature of the proceedings they took place at different times. Nothing more than an application by the administrator and an order of sale, could take place at the first term. At a subsequent term the sale would be brought before the Court, etc. The statute or usage requires that the signature of the judges, or of the presiding judge, should be signed to the minutes of the proceedings of each day; but it is not necessary that this shall appear in the record of each case. And an omission of the signature, it is supposed, would not make the proceeding void. The objection is not understood to relate to the authentication of the record.

The sale of the property was made on the 27th of May, 1826, to one Wicks and others, and deeds were made; as appears from the return of the administrator, to the purchasers. Deed from James Smith et al., to ———. Mortgage of Henry Hafer to Francis Kerr. The record of the Court of Common pleas was given in evidence in regard to the sale, etc.

A number of witnesses were examined to prove that at a certain time the children of Hafer were taken, by some friends to Clermont county, in Ohio. Objections to be made on the argument. On the part of the lessors of the plaintiff, it was argued that to render the sale good, the heirs must have been made defendants. That this is the law of Ohio, has been repeatedly decided. 2 Chase Stat. 1311, sec. 19. Also the act 24 and the act of the 12th of March, 1831, are referred to, as requiring notice to the heir. That in the case of *Ewing's Lessee v. Higbee*, 7 Ohio Rep. 340, it was held, coming up collaterally, that the heirs must be notified. That in 12 Ohio, 253, where the question was collateral, it was held that notice to the heirs was essential to the exercise of jurisdiction. If the heirs were not made parties, the proceedings would be void. That in 1 Hill, 139, it was ruled, that infant heirs can not be concluded by a surrogate sale of lands, without the appointment of

guardian. In 1 Peters Rep. 340, it is said there must be jurisdiction to protect officers from liability as trespassers, 12 Ohio, 195; 3 Ohio, 240; 11 Ohio, 442. Where there is no power to act, no legal consequences can follow. If there was no jurisdiction the proceedings were void. And that there was no jurisdiction may be shown *aliunde*. The heirs were not made parties by the appointment of Yeatman general guardian. This appointment was made nine days before the petition was filed.

The court had no power to appoint Yeatman guardian. 2 Chase, 1317. Power to appoint a guardian is limited to the county in which the court sits. In 2 Leigh, 719, evidence was admitted to show that the party was entitled to letters of administration. If such jurisdiction be exceeded by the court, the act is void. 9 Mass. Rep. 543. If letters of administration be granted in a county other than where the deceased resided at his decease, the grant is void. 5 Pick. 20, same. Also 18 Pick. 496; 8 Wend. 139; 2 Wms. on Executor, 1084. Where an appointment of a guardian is made for a minor without the county it is void. 12 Ohio, 195.

On the 20th December, 1825, the court appointed Griffin Yeatman guardian of the minor children of Henry Hafer, deceased. At this time the heirs were not in the county. Nine days afterward the administrator filed his application to sell the land. As guardian he acknowledged notice, and waived process. Four years afterward, in 1829, the court, without motion, or notice, entered the following: "And now here, to wit, on 1st of September, 1829, the court being satisfied that Griffin Yeatman was appointed in November term, 1825, guardian *ad litum*, and accepted service after the appointment; that Yeatman swears that in November, 1825, he was so appointed at the request of Kerr, the administrator, on the application of Charles Fox, Esquire; and the court order the entry *nunc pro tunc*."

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And it is contended that the record could not be so amended. 3 Ohio Condensed, 696; 5 Ib. 284; 1 Peters, 340; 3 Rand. 104. An order or judgment *nunc pro tunc* does not presuppose any such judgment had been entered. This is never done except on the death of a party, or to avoid prejudice by delay. 1 Starkie Ev. 932; 1 Strange, 426; 1 Taunt. 385; 1 Burr. 146, 219. The court had no power in 1829 to amend the record of 1825. The power to amend may be inquired into. 6 Dana, 226; 1 Peters, 340; 20 Wend. 145; 23 Ib. 616; 3 Ohio, 337, 549, 560; 2 Ohio, 27; 2 Chase, 1275, sec. 96. Any defect in process or in the pleading may be amended—nothing else. This was not a clerical error. 3 McLean, 486. It is not proposed to amend the judgment, but to amend the record by inserting the judgment, which the clerk had neglected to do. 9 Ohio, 132; 3 Ohio, 523. Power of amendment at common law. 1 Boc. Ab. 145; 1 Salk. 47; 3 Ib. 81; 2 Wilson, 147; 27 Eng. Com. L. 264; 1 Peters, 432; 7 Peters, 422; 7 Peters, 432; Ib. 522. No power after the term to amend a judgment, except a mere matter of form. 2 Ohio, 248; 3 Ib. 486, 523-4, 577. Two contradictory records are before the court. If the judge had inspected the final record he would have corrected the errors.

If the court had the power to make the entry, it could not do so legally without notice. 14 Peters, 154. But if the power may be exercised, it can not operate retrospectively. 2 Chase, 1274, sec. 87; 27 Com. L. 264.

It is urged that the record affords no evidence that Yeatman was appointed a general guardian. That it has not the signature of the judge, as required by the statute. 2 Chase, 1275, sec. 93-4. The object of requiring the judge's signature was, to see that the record was correct.

If the heirs are necessary parties, they must be so made, to give jurisdiction. The sale was made under an old order. The power to sell must be in the hands of the sheriff.

The above points were discussed at large and ably by the complainants' counsel, and some authorities not named above, were cited. The synopsis is a very imperfect one, but it states the ground on which the arguments for the plaintiffs were mainly founded; and it will enable the jury better to understand the views of the court.

The controverted points in the case, gentlemen of the jury, are questions of law, which are, properly, referred to the court. These questions, however, refer to facts which are before the jury, and on which the questions of law arise.

Hafer died in 1825. He left, as his heirs, two daughters and a son. In 1832, his eldest daughter died. Some short time after his death, the grand parents took the children to Clermont, the place of their residence.

At November term, 1825, December the 20th, the court appointed Griffin Yeatman guardian of the persons and estates of Mary Hafer, aged nine years, Caroline Hafer, aged seven years, and Henry Hafer, aged five years; and the guardian gave bond in one hundred dollars in each case.

On the 29th December, of the same year, Francis Kerr, administrator, filed his petition, naming the minor heirs as defendants, and stating the debts due by the estate and its assets, real and personal; from which it appears that the estate owed upwards of sixteen thousand dollars, and the petition prayed that the real estate might be sold. And on the same day the following entry was made: "As guardian of the children, mentioned in the above petition, I hereby acknowledge notice of the above petition, and waive the necessity of process being issued." Signed, Griffin Yeatman.

And also, the following entry was made on the same day: "and now, here, to wit, on the 29th of December, 1825, in the term of November and year aforesaid, the petition of the administrator of Henry Hafer, deceased, for the sale of certain real estate therein described, notice acknowledged by

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Griffin Yeatman, guardian to the minors mentioned in the said petition, whereupon the court appointed Casper Hopple et al., appraisers, etc. An order of sale was issued, the appraisal having been made, dated 7th February, 1826. The administrator, after giving due notice, sold the real estate for about one thousand dollars less than the appraisalment."

The cause was continued regularly, until August term, 1829, when Griffin Yeatman made an affidavit, that at November term he was appointed guardian *ad litem*, for the minor heirs of Hafer, to appear in their behalf, in an application by the administrator for the sale of the real estate of Henry Hafer, deceased, which appointment he supposed had been entered, and he requested that it might then be entered, etc. And the court at the same term say, being satisfied that Griffin Yeatman was appointed guardian *ad litem* for the defendants, to defend this suit, at the term of November, 1825, and prior to the order of appraisalment in the cause, who then accepted of his appointment, and appeared in the case, and that the defendants, by their said guardian, appeared in the cause prior to the said order of appraisalment; and it being suggested that there is a doubt whether the said facts sufficiently appear of record, it is ordered to be entered, as of the term of November, 1825, that said Griffin Yeatman was appointed by the court, guardian *ad litem* for said defendants, and that the said guardian voluntarily appeared, etc., and the sale was ratified.

It is contended that there could have been but one appointment of guardian.

The guardian first appointed, was of the persons and estates of the minors. He was appointed the 20th of December, 1825, and gave bonds on the 29th of the same month. There can be no mistake as to this appointment. It is not only matter of record, but the facts are so clearly stated as to leave no room for doubt. This appointment was made

before the petition, by the administrator, for the sale of the real estate, was filed.

It appears that subsequent to this appointment of guardian the same person was appointed guardian *ad litem*. This was, no doubt, supposed to be necessary in the prosecution of the petition.

The defense set up under the mortgage can not be sustained. If the proceedings are void, there is no connection by any of the defendants with the mortgage. And if the proceedings be valid, the mortgage has been discharged, and in no sense can it constitute an outstanding title to affect the recovery of the lessors of the plaintiff.

It is said there are discrepancies between the records. The final record is admitted to be evidence, though not signed by the judge. In the case of *Osborn v. The State of Ohio*, 7 Ohio Rep. (part 1) 212, it is said, "the signature of the presiding judge adds no validity to a record; and the record itself would be evidence, or an exemplification might be sent abroad and used without such signature."

The final record differs from the short entries made in the blotter. And this difference always exists. In the minutes the petition or pleading is never stated at length. Short entries are made, from which, and the papers referred to, the record at length is made up.

Has a court the power to inquire into the jurisdiction of the court whose record is offered in evidence? This power is necessarily exercised by all courts. But in making such an inquiry, the court must be careful to discriminate between what constitutes jurisdiction and error. Where a court, from its general powers, has jurisdiction of the subject matter, a due notice served on the party, if the proceeding be in *personam*, or an attachment laid on the land, if the proceeding be *in rem*, gives jurisdiction; and after this attached, no proceeding in the subsequent stages of the case, however erro-

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neous, will make them void. *Bank United States v. Voorhees*, 10 Peters ; 1 McLean, 224.

In this respect there is a difference between courts of a general and a limited or special jurisdiction. In the latter, the facts must appear on the face of the proceedings which give jurisdiction, but in the former, jurisdiction is presumed, unless the contrary appear. In the one case, jurisdiction may be presumed, in the other, no such presumption lies.

In *Grignon's Lessee v. Astor*, 2 Howard's Rep. 339, which involved collaterally the validity of an administrator's sale, the court say, "no other requisites to the jurisdiction of the county court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court where he dwelt or his real estate was situate, making these facts appear to the court."

And that proceeding was under a law which required "the said courts, previous to their passing on the said representation, shall order due notice to be given to all parties concerned, or their guardians," etc.

To give jurisdiction in the case before us, must the heirs be made parties ?

This is a question, as has been contended by the counsel for the plaintiffs, under the Ohio statutes, and we follow the construction of the statutes by the Supreme Court of the State. In the 16th of Ohio Rep. a proceeding to sell the lands of the deceased, was declared void, "where no notice was given to the heirs; and the land was not described." *Adams v. Jeffries*, 12 Ohio, 274; the court say, "the heir has a right to be a party to the proceedings which deprive him of his estate, and we are constrained to deny the jurisdiction of a court which attempts to proceed without him."

There are some general expressions, *Robb v. Lessee of*

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Irving, 15 Ohio, 700, which would seem to conflict with the above. The court say, "with these things the Court of Probate, on an application to sell land, have nothing to do, any further than to ascertain whether there are debts; whether the personal assets are sufficient, and whether it is necessary to sell the land," etc. But the question in that case was, whether a guardian *ad litem* could waive process and appear? By the 19th section of the act which regulates these proceedings, 2 Chase, 184, it is provided, "that the application shall be by petition, to which the lawful heir, or the person having the next estate of inheritance of the testator or intestate, shall be made defendant."

In *Ewing et al. v. Hallister's Adm'rs*, 7 Ohio Rep. 138, the court say, "before the passage of this act, it was held, that a citation, served on the general guardian of an infant defendant, was a proper mode of giving such defendant notice of the pendency of the petition. It is admitted that the general guardian may waive process, and appear for the minors. This was done, in this case, by Griffin Yeatman, the guardian. Was Yeatman duly appointed guardian? Before this answer is given, it may be proper to inquire, whether we can go beyond the entry upon the record?"

The statute provides, "that the court of Common Pleas shall have power, whenever they consider it necessary, to appoint a guardian or guardians to all minors within their county," etc. In the case of *Lessee of Mason v. Sawyer*, 12 Ohio, 195, the court held, that the appointment of guardian is open to inquiry collaterally. And they say, "if the plaintiff's lessor was not so within the county, he being the minor, the court had no jurisdiction; and the fact may be shown in this collateral way." In *Lessee of Perry v. Brainard*, 11 Ohio, 442, the court held, "that the guardianship of a minor female expires, by operation of law, when the ward arrives at the age of twelve years." In both these cases, the minor was the plaintiff in the suit.

The only objection to the first appointment of Yeatman is, that the minor heirs were not within Hamilton county at the time the appointment was made. That this would be examinable by the Supreme Court, on a *certiorari* or otherwise, may be admitted. But can it be examined into collaterally? In *Ludlow's Heirs v. McBride*, 8 Ohio, 257, the court say, "so far as the courts of Common Pleas were invested with jurisdiction over the subject matter upon which they have acted, their decisions and orders are final and conclusive; if not reversed for error, they can not be impeached collaterally. The grounds and proofs on which they proceeded are not examinable in this case."

This is an important question of law, which must rest upon general principles, and does not depend on the construction of a statute.

In making the appointment of guardian, the court having general jurisdiction, is presumed to have examined the facts on which their jurisdiction depended. The court held, in *Lincoln v. Towrey*, 2 McLean, 485, "that the appearance of the defendant is a material fact, and so is the service of process. It is admitted that the allegations in a record which were not material nor traversable, are not conclusive on the parties. But the record is conclusive of all matters in relation to the judgment, which were material, and which might have been traversed." 2 Serg. & Rawle, 123; *Leach v. Armitage*, 2 Dallas, 125; *Green v. Owington*, 16 John. Rep. 58.

In *Thompson v. Talmis*, 2 Peters, 165, the court say, "the age of the heirs was, at all events, a matter of fact upon which the court was to judge; and the law no where requires the court to enter on record the evidence upon which they decided that fact. And how can we now say, but that the court had satisfactory evidence before it, that one of the heirs was of age."

If it was so stated in terms on the face of the proceeding,

and even if the jurisdiction of the court depended upon that fact, it is by no means clear that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the court. But, to permit that fact to be drawn in question collaterally, is certainly not warranted by any principle of law.

The principle was decided in the case last cited, which must govern the question now under consideration. The matter of fact, as to the residence of the minors, when Yeatman was appointed guardian was, of necessity, before the court of Common Pleas, when they made the appointment; and it was not necessary to place that fact upon record. That court determined it, and can the fact be open to proof collaterally, when the record is offered in evidence? If such be the law, then every fact necessary to be established in a judicial proceeding, whether it relate to the jurisdiction of the court, or to the merits of the case, and which did not constitute a part of the record, is open for examination. And how numberless are these facts, in the action of courts? In this view, less effect would be given to the judgment of the court, than to the verdict of a jury. In the transaction of its business, a court in almost every step taken in a cause must act upon rules, adopted by statute or by judicial discretion. And all these rules impose limitations, within which, certain things must be done. And when the court, having the subject before it, decides a matter under these rules, can such matter ever be inquired into collaterally?

I am aware that, in New York, it was held, where no fraud or unfairness was alleged in regard to the service of process, evidence might be heard to contradict the return of the officers; in a case on a record from a sister State, that decision, I think, must stand alone.

Nine days before the petition was presented by Kerr, Yeatman was appointed. A waiver of process and an entry of his appearance were made in the presence of the court, and

were entered upon its record. Should the fact under consideration be held to be open, collaterally, it is impossible to say to what uncertainties and mischiefs the principle might lead. How is the evidence on which the court acted to be preserved? Life is uncertain, and a fact susceptible of clear proof now, may be involved in great uncertainty twenty years hence. No one may be able to prove it. And shall titles, under judicial sales, rest upon so uncertain a basis?

Admit all that is contended for, in regard to the residence of the infants, when the guardian was appointed. No one will contend that the minors must, in fact, be within the county when the appointment was made. They may have been absent on a visit; their own mother was not living, and they were left in the charge of their step-mother. Her home would be their domicile, and by the law, she was entitled to occupy the mansion house one year from the death of her husband. What is to fix the domicile of infants? The home of these infants was in Hamilton county. Their property was there, and it was there only that a guardian could properly be appointed. If they had not, at the time, an actual residence in Hamilton county, they had constructively. It was the place of their birth, where their father and mother lived and died, and where all their property was to be found. They had left the county, at most, only a few months before this appointment was made. There is no suggestion of fraud or unfairness in the appointment.

If it were proper now, after the lapse of twenty-three years, to inquire into these facts, how are we to ascertain that the court of Common Pleas had not evidence before it, that the absence of the minors from the county was only temporary, and did not affect their domicile? If this question were open, we should incline to say that the residence of the infants with their grand-parents, for a few months, in Clermont county, is not evidence of a change of domicile, under the circumstances, so as to affect the jurisdiction of the court.

But we think, that this matter, without an allegation of fraud or unfairness, is not open for inquiry, especially after the lapse of twenty-three years.

The amendment at the instance of Kerr, the administrator, on the affidavit of Yeatman, 1 Sept. 1829, who stated that at the November term he was appointed guardian, *ad litem*, as a prerequisite by the court, to the attainment of an order to sell the land, was the exercise of a discretion which no court, in a collateral manner, can disregard or treat as a nullity. It was not, in fact, the amendment of a judgment or an order. It was supplying the omission of the clerk in failing to enter, as his duty required, the appointment. The court was satisfied from the evidence, that the appointment had been made by them, and that the clerk had failed to perform his clerical duty in entering it. The case had proceeded upon the presumption that the entry of the appointment had been made as ordered. The capacity of Yeatman as guardian *ad litem*, had been recognized, in several important steps taken in the case. By the entry *nunc pro tunc*, no one was taken by surprise, no one gained an advantage; in the opinion of the court, such an entry was necessary to legalize the proceedings. The debts of the estate were large and no doubt pressing, and it was the interest of the heirs to have them paid; under such circumstances the order was entered. It had every equitable consideration to recommend it, and there was no objection to it, as it seems, of any force. The objection comes after the lapse of near a quarter of a century, when the land, in the hands of the purchasers, their heirs or grantees, by the improvements thereon, and by the growth of the city, has become of immense value, and it is made before a different tribunal from that which authorized the entry: under such circumstances the objection can not be sustained. When the order was made, the parties were still before the court, the cause having been regularly continued to that time, and under the circumstances we are not prepared

to say that a court could set aside the proceeding, which exercised a supervisory power over the action of the Common Pleas—but the only question before us is, whether the order was void. We think it can not be so treated. The questions of law having been considered by the court, gentlemen, but little has been left for your consideration. Your verdict will be made under the opinion of the court expressed.

Certain instructions were asked, which were refused ; and the Court charged the jury that the county of Hamilton, where the children were born and where their father died, leaving a widow, the step-mother of his minor heirs, and who was entitled to dower in the lands, and who remained, as appears from the evidence, some time in the county, constituted in law the domicile of the minors, their property being there; and that notwithstanding their absence as proved, the court of Common Pleas, of Hamilton county, had power to appoint a guardian for them. That the facts on which the court acted were not required to be placed on record, and that every presumption was in favor of the action of the court, especially after the lapse of twenty-three years. That the proceedings of the court on the petition of the administrator for the sale of the lands, and the deeds made under the sales, divested the title of the heirs, and vested it in the purchasers.

The court then informed the jury, that by the ruling of the above points of law favorable to the defendants, their verdict would be, not guilty.

Verdict, not guilty.

HOTCHKISS'S EXECUTRIX, ETC. v. GREENWOOD & WOOD.

A patent right can not be sustained for making an article of a new material, according to a known mode.

If the material be new, as a compound invented, a patent right may be claimed for that.

Hotchkiss's Executrix, etc. v. Greenwood & Wood.

The invention must relate to something new, in structure or material.

Door knobs having been made of glass, wood, brass, and other materials, the making of the same of potter's ware, or porcelain, a material long known, will not entitle any one to a patent.

And if the mode of fastening the shank to the knob be the same as has been done in fastening the shank to knobs made of other materials, there is no invention to sustain an exclusive right.

And this is the case, although the porcelain knob may be more valuable than knobs made of any other materials.

Mr. Ewing for plaintiffs.

Messrs. Fox and Chase for defendants.

OPINION OF THE COURT.

THIS action was brought against the defendants, to recover damages for the infringement of a patent right obtained by John E. Hotchkiss and others, for an improved method of making knobs for locks, doors, cabinet furniture, and all other purposes for which wood and metal, or other material, for knobs are used, etc.

The defendants pleaded not guilty, and gave notice that the improvement claimed was known and practiced, and that such knobs were made, used, and sold by others, before his patent, in different parts of this country, and also in Great Britain and Germany, etc.

The patent was given in evidence, and the schedule which constitutes a part of the patent, in which the patentees claimed that they "had invented an improved method of making knobs for locks, doors," etc. "And that the improvement consists in making said knobs of potter's clay, such as is used in any species of pottery; also of porcelain; the operation is the same as in pottery, by molding and burning, and glazing; they may be plain in surface and color, or ornamented to any degree in both; the modes of fitting them for their application to doors, locks, furniture, and other uses, will be as various as the uses to which they may be applied, but chiefly founded on one principle, that of

having the cavity in which the screw or shank is inserted, by which they are fastened, largest at the bottom of its depth, in form of a dove-tail, and a screw formed therein, by pouring in metal in a fused state. In the annexed drawing A represents a knob with a large screw inserted, for drawers and similar purposes; B represents a knob with a shank to pass through and receive a nut; C the head of the knob calculated to receive a metallic neck; D a knob with a shank, calculated to receive a nut on the outside or front."

"What we claim as our invention, and desire to secure by letters patent is, the manufacturing of knobs, as stated in the foregoing specifications, of potter's clay, or any kind of clay used in pottery, and shaped and finished by molding, turning, burning and glazing; and also of porcelain."

Evidence was given to the jury, conducing to show the novelty and utility of the invention by the patentees, as claimed by them, and that it was their joint invention.

Some evidence was given by the defendants tending to show that the said alleged invention was not originally invented by any one of the said patentees; and that, if said invention was original with any of the patentees, it was not the joint invention of all of them; and other evidence tending to show that the mode of fastening the shank or collet to the knob, adopted by the plaintiffs and described in their specifications, had been known and used in Middletown, Connecticut, prior to the alleged inventions of the plaintiffs, as a mode of fastening shanks or collets to metallic knobs. And the evidence being closed, the counsel for the plaintiffs insisted in the argument that, although the knob, in the form in which it is patented, may have been known and used in the United States, prior to their invention and patent, and although the shank and spindle, by which it is attached, may have been used and known in the United States prior to said invention and patent, yet if such shank and spindle had never before been attached to potter's clay or porcelain, and if it required

skill and thought and invention to attach the said knob of clay to the metal shank and spindle, so that the same would unite firmly and make a solid and substantial article or manufacture; and if the said knob of clay or porcelain so attached, were an article better and cheaper than the knob theretofore manufactured of metal or other materials, that the patent was valid, and asked the court so to instruct the jury.

This instruction, gentlemen of the jury, the court refuse to give, in the form requested. The plaintiffs claim no invention in regard to the material of which the knob is composed. In their specifications, they say, "the improvement consists in making said knobs of potter's clay, such as is used in any species of pottery; also of porcelain," etc. These materials have been known for ages, nor was there any novelty in the knob itself, as knobs of a similar form, made of other materials, had long been in use. They had been constructed of brass, silver, glass, wood, iron, etc. The shank and spindle were not claimed as new. There was nothing left, then, but the attaching of the spindle to the knob. And on this point the instruction is made to turn: "Yet if such shank and spindle had never before been attached to a knob made of potter's clay or porcelain, and if it required 'skill and thought and invention' to attach the said knob of clay to the metal shank and spindle, so that the same would unite firmly and make a substantial article or manufacture," etc. It is true this part of the instruction is founded upon the supposition, that to attach the spindle to the knob of clay or porcelain, "required skill and thought and invention," leaving the invention, without designating it in any form, or saying that it must be different from any known mode, open to the jury. Now it requires skill and thought to attach a spindle to any kind of knob. Such skill as an individual acquainted with mechanics, only, can exercise; and no skill can be exercised without more or less of thought. And

where skill and thought are united, two of the requisites to sustain the right of the plaintiffs, unless the mind of the jury were brought distinctly to the point of invention, which is the hinge of the case, they might infer its existence from the two preceding requisites.

To give an exclusive right, there must be, what is called a new principle, invented. Not a new principle in an abstract sense, for none such is likely to be discovered; but a new combination or mode, for instance, of attaching the spindle to the knob. If in this there is nothing different from a known mode, there can be no invention which gives a new right to the plaintiffs. And yet the mind of the jury, by the instruction asked, is not drawn to this consideration. This instruction, therefore, in the form asked, is rather calculated to mislead the jury than to bring to their minds, distinctly, what the invention must be.

Another part of this instruction, as asked, is objectionable. "And if the knob of clay or porcelain so attached, were an article better and cheaper than the knob theretofore manufactured of metal or other materials, that the patent was valid," etc. Now, here, the "cheapness" and "quality" of the article are relied on as giving, or contributing to give, the plaintiffs an exclusive right. But these afford no ground whatever for a patent. The words "so attached," are used referring to the preceding part of the sentence, requiring skill, thought and invention, but not so as to bring the mind of the jury to what must be invented to sustain the patent; and the quality and cheapness of the article are so connected as to have an influence on the jury, to which they are not entitled. In an action of this kind, the comparative value of the thing invented, so far as the exclusive right is concerned, it is not necessary to show beyond the fact that it is useful, or of some value.

An article made according to a known method, may be better than other articles made in the same manner, on ac-

count of its superior mechanism. But this is no foundation of an exclusive right. And if a material not before used in the same structure be used, that gives no claim to a patent, though the article be more valuable than any other of the kind. If a compound be made, not before known, of different ingredients, that is a ground for a patent, not for the thing constructed, but for the compound of which it is made.

The ground on which a patent may be claimed is, that something new and useful has been invented. A thing which did not before exist. A machine, for instance, differing from all other machines in its structure, movement or effect, by reason of the introduction of some new mechanical combination or principle.

The court will, therefore, instruct the jury, "that if knobs of the same form and for the same purposes with that described by the plaintiffs in their specifications, made of metal or other material, had been known and used in the United States prior to the alleged invention and patent of the plaintiffs; and if the spindle and shank, in the form used by the plaintiffs, had before that time been publicly known and used in the United States, and had been theretofore attached to metallic knobs by means of the dovetail and the infusions of melted metal, as the same is directed in the specification of the plaintiffs, to be attached to the knob of potter's clay or porcelain, so that if the knob of clay or porcelain is the mere substitution of one material for another, and the spindle and shank be such as were theretofore in common use, and the mode of connecting them to the knob by dovetail be the same that was theretofore in use in the United States, the material being in common use, and no other ingenuity or skill being necessary to construct the knob than that of an ordinary mechanic acquainted with the business, the patent is void and the plaintiffs are not entitled to recover."

The counsel for the defendants asked the court to instruct the jury, that if they should be satisfied that any one of the

patentees was the original inventor of the article in question, and that the same was new and useful, yet if they should be satisfied from the evidence that all the patentees did not participate in the invention, the patent is void, and the plaintiffs can not recover. And the court gave the instruction, modified by the remark, that the patent was *prima facie* evidence that the invention was joint, though the fact might be disproved at the trial; and the court said, there was no evidence, except that of a slight presumption, against the joint invention as proved by the patent.

The jury found for the defendants, and the case being taken to the Supreme Court, on points excepted to, was affirmed. 11 Howard.

PARKER v. CORBIN.

Where a patent right has been infringed, the defendant not knowing of the plaintiff's right at the time, no more than compensatory damages will be given.

But where the infringement is characterized by a disposition to affect the interest of the patentee, counsel fees, and what may be termed vindictive damages, may be assessed by the jury.

Mr. Ewing for plaintiff.

OPINION OF THE COURT.

THIS is an action for the infringement of a patent, by the construction of a water wheel for a saw mill, using the right which exclusively belonged to the plaintiff. The defendant suffered a default, and the jury were sworn to inquire of the damages, etc.

The counsel prayed the court to instruct the jury that the plaintiff was entitled to recover as a part of the damages the counsel fees paid by the plaintiff. The court declined giving the instruction positively, but said to the jury, the damages were to be assessed by them in the exercise of their judg-

ment, from the evidence. That where the act complained of had been done without a knowledge of the plaintiff's right, and under such circumstances as to authorize the jury to infer that the defendant was not aware that he was violating the rights of any one, the damages should be so graduated as to give nothing more than to compensate the injury done to the plaintiff. But where the circumstances were of a somewhat aggravated character, what was sometimes called in the law vindictive damages might be given, which would include counsel fees, and something more by way of example to deter others from doing the same thing. Verdict for plaintiff.

THE UNITED STATES v. HENRY R. WARNER, CYRENIUS H. WISHUE, RAYMO DEMOND, AND JOHN KIRBY.

[Judge McLean was present at the commencement of the trial, but left before the evidence closed, to attend the Supreme Court at Washington.]

In the construction of statutes, it is a rule of universal application, that effect must be given to the words used by the Legislature, when there is no uncertainty or ambiguity in their meaning.

Congress having expressly provided, in the 12th sec. of the act 7th July, 1838, that any act of "misconduct, negligence, or inattention" on the part of those concerned in the steamboat navigation, producing death as a result, shall be deemed manslaughter, it is not necessary to aver, in an indictment framed upon it, or to prove on trial, a malicious intent in the persons charged—such intent not being made a necessary ingredient of the offense.

The essence of the crime, under the section referred to, consists in the fact of there being "misconduct, negligence, or inattention" in such degree, and of such a character, as to have produced the result set forth in the indictment, irrespective of the intention of the persons charged.

In an indictment under said section, charging neglect of duty on the part of steamboat officers, whereby the boat came into collision with a schooner, and the former was sunk, and lives destroyed; if it appear that the accident was the result of misconduct, or unskillfulness of the persons in charge of the schooner, or that the collision was from any other cause, unavoidable, the defendants ought not to be convicted.

Under the second count of the indictment, to justify a verdict of guilty, the jury must be satisfied that the persons whose lives are averred to have been destroyed, came to their death by drowning, as a result of collision.

If the jury are satisfied, that the individuals whose lives were lost, having been

United States v. Henry R. Warner et al.

apprized that they would be safe by remaining on the upper deck of the steamboat, and that in fact, those who remained there, were saved; under the influence of excessive alarm, unnecessarily and indiscreetly left the boat, when sinking, on floats or rafts, and were drowned; the loss of their lives is not so connected with, and a necessary result of collision, as that the defendants can be held responsible for such loss of life.

But, if the persons drowned conducted with ordinary prudence and discretion, in the circumstances in which they were placed, their deaths may be viewed as directly resulting from the collision, and the averment of the indictment in that respect, is supported.

It was the duty of the captain, with reasonable promptitude, to ascertain the extent of the injury to the boat, and upon the discovery being made that she would go down, without necessary loss of time to order the boat to be run ashore; and if, from indecision, or neglect, he failed in these duties, and the death of the passengers, or others, resulted from such delay, he is responsible for such result.

T. W. Bartley, Esq., District Attorney, appeared for the United States.

Messrs. *Swayne* and *Beecher* for the defendants.

OPINION OF THE COURT, BY JUDGE LEAVITT.

THE defendants, viz., Warner, as captain, Wishue as first mate, Demond as second mate, and Kirby as wheelsman of the steamboat Chesapeake, then navigating Lake Erie, were jointly indicted for manslaughter, under the 12th section of the act of Congress of the 7th of July, 1837, entitled "An act to provide for the better security of the lives of passengers, on board of vessels propelled in whole or in part by steam." 5 Peters, Laws of the United States, 304. This section is in these words: "That every captain, engineer, pilot or other persons, employed on board of any steamboat, or vessel, propelled in whole, or in part, by steam, by whose misconduct, negligence or inattention, to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof, before any Circuit Court of the United States, shall be sentenced to confinement, at hard labor, for a period not more than ten years."

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The indictment contains five counts, of which the following is a condensed statement:

1. Charges the defendants, in their respective capacities, with general misconduct, negligence, inattention, whereby the collision took place, the boat was sunk, and the lives of several persons destroyed.

2. Charges that it was the duty of the defendants to keep a lookout, and so to steer or navigate the boat, as to avoid collision, and that in their respective capacities, they neglected these duties, whereby the collision took place, the boat sunk, and the lives of Eli Cone, William N. Yerke, and David Folsom, were destroyed by drowning.

3. Charges, that it was the duty of the captain and mate, to keep a lookout, and to give orders to the wheelsman so to steer as to avoid collision, etc.; and that the captain and the mate neglected these duties, and the wheelsman neglected to steer, etc., whereby collision took place and lives were lost.

4. Contains substantially the same averments as the preceding, with the addition, that it was the duty of the defendants after the collision, to make an immediate examination of the injury; and that they neglected this duty, etc., whereby the boat sunk, and the lives of certain persons were lost.

5. Charges, that after collision, the defendants neglected their duties in the following particulars: 1. In not causing an immediate examination to ascertain the extent of the injury to the boat: 2. In neglecting to close the ash-hole: 3. In neglecting to run the boat ashore, at the nearest and most convenient point without delay; whereby the boat sunk and lives were lost.

A motion for leave to the defendants to sever in their trial, and a motion to quash some of the counts of the indictment were overruled. The jury were then sworn to try the defendants, Warner, Wishue and Demond. The defendant, Kirby, was not put on his trial, and as to him, the District Attorney subsequently entered a *nolle prosequi*.

[As it would occupy too much space to set forth separately and in detail, the testimony of the numerous witnesses sworn on the part of the prosecution, it is proposed to give, in brief an outline of their statements, which with the references to the evidence, contained in the charge of the court, as applicable to the different allegations in the indictment, will present a satisfactory view of all the material facts of the case.]

In the afternoon of the 9th of June, 1847, the steamboat Chesapeake, with the defendants on board, in the several capacities before stated, left Buffalo, destined for Cleveland. Between 11 and 12 o'clock, in the night of that day, being about six miles from shore, and nearly opposite the harbor of Conneaute, the captain and first mate having retired to their berths, and the defendant Demond, as the second mate, being the officer on watch, and the defendant Kirby, at the wheel, the boat came in contact with the schooner John Porter, Captain Thomas, master, bound for Buffalo, striking her nearly at right angles, about midship, on her starboard side, and causing her to sink in from five to ten minutes after the collision; her crew being saved from immediate death by their transfer to the steamboat. It was very soon ascertained that a hole had been made on the larboard side of the bow of the boat, and that water was rapidly coming in. The pumps were immediately set to work, all hands ordered to bail, and attempts made to stop the leak; and the boat was put toward shore, heading for the light at Conneaut harbor, but the water gained so fast, that when within one and a half or two miles from shore, the fires were extinguished, and the engine ceased to work; and, in an hour and a half from the stopping of the engine, the boat sunk, in thirty-six feet water.

There were about sixty cabin passengers on board, who with the steerage passengers, officers and crew, made the whole number between eighty and ninety. As the boat went down, the hurricane or upper deck broke, and became detached from the boat. This deck had been made fast by ropes

to the mast of the boat, and remained stationary over the place where the boat sunk. The captain had given notice to those on board, that this deck was the place of safety, and advised all to get on it. Some fifty or sixty persons took refuge upon it, and were all saved; and there was room enough for twenty-five or thirty more. The persons on this deck were taken from it about daylight, by the steamboat General Harrison. The night was not dark, the sky being clear and the stars visible. There was some mist, or fog, near the surface of the lake; the wind was off shore, and nearly from the point S. S. W.

There was but one yawl attached to the boat, which was sent ashore with thirteen or fourteen persons in her, who were all saved. Some of the passengers, and a part of the crew of the boat, prepared floats or rafts, made of doors, tables, etc., on which as the boat sunk, they launched into the lake; and, of those who betook themselves to these means of safety, a Mrs. Howk, and four others, viz., Messrs. Vandomen, Cone, Yerke, and Folsom, lost their lives.

The counsel for the defense, after the District Attorney had closed his opening argument, declined addressing the jury, and moved the court to instruct them to the following effect:

1. As all crime consists in intention, the defendants are not guilty, unless they knowingly and willfully neglected their duty.

2. As the law does not require infallibility, the defendants are not responsible for errors in judgment, in the performance of their duties.

3. That greater strictness in proof is required in criminal than in civil cases, and the defendants, in order to be holden liable, must be brought within the statute in every particular.

4. That if the loss of life was not the necessary consequence of the sinking of the boat, but resulted from imprudence in leaving the wreck contrary to the captain's advice, he can not be convicted.

5. That if the collision was occasioned by want of proper lights on the schooner, the defendants ought not to be convicted.

Judge Leavitt charged the jury substantially as follows:

Before I call the attention of the jury to the testimony, as it applies to the allegations of the indictment, it becomes my duty to notice the propositions submitted by the counsel for the defense, on which the instruction of the court is requested.

The section of the Act of Congress, on which this indictment is framed, declares, that officers and others, employed on any steamboat, by whose "misconduct, negligence, or inattention, the life or lives of any person or persons on board," shall be destroyed, shall be deemed guilty of manslaughter.

It is believed, this is the first prosecution which has been instituted under this law, and that no construction has been given to it, in reference to the points now presented, by any of the courts of the Union.

It is a rule of universal application in the construction of statutes, that courts must be governed by the words used to express the intention of the legislature, when they are free from all uncertainty or ambiguity. And this rule leads the mind to the conclusion, that it was the design of the law-making power, in the adoption of the section under consideration, to create an offense, and annex a punishment to it, on principles variant from those which apply to crimes at common law, or to those generally created by statutory enactment. At common law, and usually in statutory crimes, the intention with which the act is done, charged as criminal, constitutes the element of the crime. But, in the section now brought to the notice of the court, the Legislature seem studiously to have avoided the use of any terms, or words, making the intention of the party an ingredient of the offense. It is declared, in words so plain as to admit of no doubt, that any act of "misconduct, negligence or inattention," on the part of any one concerned in steamboat naviga-

tion, producing as a result, the loss of life, shall incur the guilt and the penalty of the crime of manslaughter. If it had been intended that these consequences should follow, in cases only where there was evidence of a positive, malicious intent, the words used would doubtless have been such as to have made that intention clear. And, in that case, the offense defined and punished by the statute, would have been the same as manslaughter, as recognized at common law, and the statutes of all the States of the Union. But, it is most obvious, from the language of this section, that Congress intended to go beyond this, and to provide punishment for acts to which the common law did not affix guilt or annex a penalty.

I am, therefore, led to the conclusion, that it will be the duty of the jury, if satisfied the material allegations of the indictment are sustained by the evidence, to return a verdict of guilty. There can be no doubt, that it was the intention of Congress to create an offense by this statute, the essence of which consists in "misconduct, negligence, or inattention" in such degree, and of such character, as to have resulted in the loss of human life. This is a subject matter, clearly within the jurisdiction of Congress; and having provided, that certain acts of delinquency, attended with a certain result, shall subject the party to a penalty, irrespective of motive or intention, there is no reason why, in a proper case, the law should not be enforced. If it were true, as insisted by the counsel for the defense, that this view of the law gives to it a character of harshness and severity, which must render it odious to the community, and a reproach to a humane government, it would afford no reason why courts and juries should refuse to carry it into effect. Until repealed by the power which enacted it, it must have the force of law. But the statute under consideration is not liable to this objection. It is true, it declares, that certain facts being established, the parties implicated shall be deemed guilty of manslaughter;

but it vests in the courts an ample discretion in regard to the punishment to be inflicted, which, properly exercised, will effectually guard against undue severity. The penalty consequent on a conviction may be imprisonment for ten years; but if the circumstances are such as to call on the court for lenity, the punishment may be merely nominal—not extending beyond a few hours' or a few days' imprisonment. And it may be here remarked, that this great latitude of discretion, vested in the courts by the statute, by which it becomes their duty to graduate the punishment according to the facts of the case, even to the extent of making it merely nominal, is conclusive to prove, that Congress, in this enactment, did not contemplate the commission of the crime of manslaughter in its heinousness and guilt, as defined by the common law. If such had been the view of that body, it would not have been left in the discretion of the court, in case of a conviction, to assess a merely nominal punishment. For, according to the common law sense of the crime of manslaughter, it is impossible to conceive of any case in which the exercise of such a discretion would be either justifiable or necessary to the extent contemplated by the statute.

It may not be improper here to remark, that the title of the act of Congress, and the circumstances leading to its passage, are significant of the purposes of its enactment, and throw light upon its true construction. It is entitled, "An act to provide for the better security of the lives of passengers on board of vessels, propelled in whole or in part by steam." It is a matter of public notoriety, and constitutes a part of the history of the times, that within a short period anterior to the date of this statute, numerous steamboat disasters had occurred in our country, attended with a melancholy loss of human life, under circumstances justifying the conclusion that there was gross negligence, yet without the possibility of proving, either positively or inferentially, a malicious intent. Such was the fearful magnitude of the evil, that public feel-

ing demanded such national legislation on the subject as would be effective in preventing the recurrence of those calamities. The stern legislative provision under consideration, was the result of this state of things. Its design was to enforce the greatest possible vigilance and caution on the part of those concerned in steamboat navigation. The utility of the law has been satisfactorily tested by its salutary results. It has greatly elevated the business of steamboat navigation, by introducing in all its departments, men of higher moral characters, and superior practical qualifications for their duties. As a consequence, the instances of reckless disregard of human life, and accidents resulting from improper hazards, are much less frequent, while the public confidence in the safety of steamboat traveling is greatly increased.

It will be for the jury to say, whether the result charged in the indictment, namely, the deaths of the individuals named, is justly imputable to the "misconduct, negligence, or inattention" of the defendants, or any of them. If the collision happened from the improper and unskillful navigation of the schooner, or any other cause, rendering it an unavoidable occurrence, the defendants are entitled to a verdict of acquittal, in so far as they are charged with misconduct or omission of duty in connection with the collision.

There are some other points presented in the instructions asked for, which will be noticed by the Court in the consideration of the evidence, as applicable to the indictment. To this evidence, I propose very briefly to direct the attention of the jury.

It will be proper to remark here, that the case presents itself in two aspects; *first*, in reference to the allegations of misconduct and negligence, producing the collision, and *second*, in reference to the allegations of misconduct and negligence, in not taking prompt measures for the safety of the passengers after the collision.

The second and fifth counts are those principally relied on by the prosecution; and the views which I propose to present, will be confined to these.

The second count charges substantially, that the defendants, in their several capacities, were guilty of misconduct and neglect, in not keeping a proper lookout, and in not using the proper efforts to steer and navigate the boat, whereby she came in collision with the schooner John Porter, and the lives of the persons named were destroyed by drowning.

As the testimony clearly shows, the captain and first mate were not on duty for some time before, and when the collision took place, they can not be held answerable for it; and, under the second count, the inquiries of the jury will be confined to the conduct of the second mate, who was then the officer on deck.

Did the second mate, Demond, fail in his duty, in not keeping a proper lookout, as the officer on deck? Captains Kelsey, Shook, Perkins, and Stannard, experienced and skillful navigators on the lakes, have been sworn as experts in this case. They concur in stating that the officer on deck is for the time being, the sailing-master, and charged with the general supervision of the boat; that it is his duty to be on the lookout for lights, obstructions, etc.; to give orders, when necessary, to the wheelsman and to the engineer, and that in general his proper place is on the deck, though it is his duty to be in other parts of the boat, where his presence may be required; and these witnesses also state, that it is proper and usual for the mate, when leaving the deck, except it be for a very short period, to give notice to the wheelsman of his intention, and request him to keep a lookout during his absence. It is also stated, by all the experts except one, that it is the duty of the wheelsman, not only to steer, but to keep a lookout for lights, etc., and that his position for this purpose is the most favorable one on the boat.

The witness Kirby, who was at the wheel, when the col-

lision took place, says the defendant, Demond, was on deck very shortly before it happened, and had just left the wheelhouse, as the boat struck the schooner. He saw Demond run to the bell and ring, to stop the engine, and immediately after, the collision took place. There is no evidence that Demond gave any orders to the wheelsman; nor does it appear he saw the schooner, till at the very moment of the collision.

The witness Seymour states, that he was at the wheelhouse for some time before the collision happened; that Demond was on the deck, walking back and forth, and, part of the time, sitting with witness in conversation with him. Witness retired to his berth, and had hardly got to his room, till he heard two bells in quick succession, one to stop the engine, and one to back off. He also says, that while on deck he saw no lights, but those of the light-house at Conneaut, and of the steamboat Constellation.

This is all the material testimony as to this point; and from this, the jury will decide whether Demond was guilty of negligence or omission in not having discovered the schooner in time to avoid the collision.

The jury will also inquire, under the second count, whether Demond, as the sailing master of the boat, failed in duty, in not giving proper orders to the wheelsman, as to the course and direction of the boat. And in this inquiry, it will be proper for the jury to bear in mind, that if the wheelsman was steering the boat correctly, no order was required from the sailing master, and he can not, therefore, be in fault for not giving an order.

It seems, from the testimony of all the experts, that the steamboat, at the time she struck the schooner, was in the track usually followed by boats, going up the lake, which at that place is about six miles off shore. Kirby, the wheelsman, says he saw the schooner's light flash up for a moment; saw the light over the left bow of the boat, about one mile

distant, witness steering at the time W. S. W. He then put the boat one point further out into the lake—in a few minutes saw the schooner very near; put the helm hard a-port, and immediately the boat struck the schooner. Witness says, after he saw the light of the schooner, it disappeared, and he saw it no more—supposed it was hid by the sails.

Capt. Thomas, the master of the schooner, states, that he first saw the steamer's lights six or seven miles ahead, he steering at that time N. E. by E. He then put his vessel one point further out into the lake, and kept her steadily on that course. This witness says, it is the usage for sailing vessels, descending the lake at that point, to keep in shore from the steamboat track; but he thought he was rather too near the land, and therefore gave the order to put the schooner further out. He also testifies that there was a light at the end of the jib of the schooner, and also that just before the collision, he took the light out of the binnacle, held it up, and hailed the steamboat.

Although several witnesses state there was no light on the schooner at the time the collision happened, the weight of evidence proves there was a light.

In coming to a conclusion as to who was in fault in this collision, it will be important for the jury to attend specially to the testimony concerning the relative position and course of the schooner and the steamboat just before and at the time they came together. For, if, as before stated, the accident occurred through the improper navigation, and wrong course of the schooner, the sailing master of the steamer can not be held accountable.

The captains already named, testifying as experts, agree in the opinion, that the schooner steering N. E. by E., and the steamer W. S. W., being six miles apart, the schooner must have been considerably in shore from the line of the steamer's course, and that it was the duty of the schooner to have kept inside of that line, hugging the shore. And these witnesses

say, if she had pursued that course, a collision would have been impossible, without a change of the steamer's direction. Kirby says, he first saw the schooner's light over the left bow of the steamer, and if so, the schooner was then in shore from the line of the steamer's direction.

It is proved by the experts, to be the general usage in the navigation of the lakes, that when a sailing vessel and a steamboat are approaching in opposite directions, it is the duty of the former to pursue her course steadily; and, if necessary, the steamboat is expected to diverge from her previous direction. Capt. Shook, and perhaps some of the other professional navigators, say, Kirby, the wheelsman of the Chesapeake, was right, under the circumstances, in first putting the boat one point out into the lake, and when very near the schooner, putting the helm hard a-port, the effect of which was to give her a still more northerly direction.

If the jury, upon full consideration of the evidence, shall come to the conclusion that the schooner, through mistake, or unskillfulness of her sailing master, was proceeding across the line of the steamer's proper course, and that therefore the collision was unavoidable, the defendant, Demond, can not be held responsible for the consequences. Upon this supposition, there is no ground for the conclusion, that the accident was the result of neglect, or inattention on his part.

If, however, the jury are satisfied, the collision is attributable to his delinquency in duty, in not keeping a vigilant lookout, and in not properly navigating the boat, as charged in the second count, it will then be their duty to inquire further, whether, as the result of the collision, the lives of the individuals named in the indictment were lost by drowning.

There is no room to doubt, from the evidence, that the lives of those persons were destroyed by drowning. But, it is insisted, and the court is requested so to instruct the jury, that if the loss of their lives was not a necessary result of the collision, the allegation in the indictment, as to the means

by which they came to their deaths, is not sustained, and, consequently, that there can not be a verdict of guilty on this count, or, indeed, any of the counts in the indictment.

The evidence is not satisfactory to prove, that any lives were lost, except those of persons, who left the boat, on floats or rafts. And it is proved, beyond all doubt, that the captain, and probably some other officers of the Chesapeake, notified the passengers that they would be safe by getting on the hurricane deck; and it is also clearly proved, that all who sought this place of safety were preserved. Whether the persons who unfortunately resorted to other means to save themselves, were apprized of the security afforded by the hurricane deck, is not known. If, being made acquainted with the fact, or if, by reasonable vigilance, they could have acquired this information, the persons whose lives were destroyed, under the influence of excessive alarm, unnecessarily and indiscreetly left the boat, preferring to run the hazard of launching into the lake, on floats or rafts, and as a consequence, were drowned, the destruction of their lives is not so connected with, and a necessary result of the steamboat disaster, as to make the defendants answerable for their loss.

On the other hand, if these persons, under the pressure of the circumstances in which they were placed, conducted with ordinary prudence and discretion, then the allegation in the indictment, as to the means by which they came to their deaths, is sustained.

The court will now call the attention of the jury to the fifth, or last count of the indictment.

This count charges the defendant with a failure in duty, after the collision, in the following particulars:

1. In not causing an immediate examination to ascertain the nature and extent of the injury to the boat.
2. In neglecting to close the ash-holes.
3. In neglecting to run the boat ashore at the nearest and most convenient point, without delay.

I will not detain the jury by a re-statement of the evidence of each witness on these points; but will present a summary of the material facts proved, in relation to each of them.

First, as to the allegation of improper delay in the examination of the injury to the boat.

The degree of promptitude required of the officers of the boat, in making this examination, must depend in some degree on the character of the shock produced by the collision. If it was severe, and of a nature which should have induced the apprehension in the mind of an experienced and skillful navigator that the boat was seriously injured, the officers should be held to greater promptitude and vigilance in the examination of the injury, than under the opposite state of facts. It appears, that to some of the witnesses, the shock from the collision seemed slight, and produced no apprehension of serious injury to the boat; while others thought it severe, and such as necessarily to jeopard the safety of the persons on board.

The defendant, Capt. Warner, had retired to his room for the night, but was roused by the shock of the collision; and some of the witnesses say, they saw him very soon after the collision, leaving his room without coat, hat or boots, and going to the forward part of the boat. These witnesses state, that no more time elapsed between the shock of the collision and the appearance of Capt. Warner on the deck, than was necessary to enable him partially to dress himself. The witness, Lytle, states, that he had not gone to his berth when the collision took place, but was near the saloon below the promenade deck. He was alarmed by hearing the engineer's bell ring in a very quick and hurried manner; and immediately the collision occurred; the schooner and the boat stuck together for a very short time, when the boat backed off, and they separated. This witness immediately lowered a light over the bow of the boat, and discovered a hole, in the left side of the bow, through which the water was coming in. He went at once on deck, where he met the captain, and

reported to him the result of his examination. The captain then ordered the second mate to make a thorough examination, and very soon the order was given to put the boat ashore. The witnesses, Hubbard, Kimball, and Dwight, agree in stating there was an examination, but can not state the precise time which elapsed from the collision till the examination was made. The last named witness says, he does not know that the captain could have done more than he did do. The witness, Howk, thinks about twelve minutes passed from the time of the collision, till it was discovered the boat was leaking.

As to the averment of neglect, in not stopping the ash-hole, the jury will have no difficulty in the conclusion that it is not sustained. This hole, it would seem, opens on the outside of the boat about six inches below the timbers of the main deck.

Capt. Shook and others testify, that when the boat had so far sunk as to take in water at this hole, it would be impossible to prevent her from going down, and that the only effect of closing it, would be to retard the sinking for a short time.

I now call the attention of the jury to the third specification of the fifth count, namely, neglect in not running the boat ashore at the nearest and most convenient point without delay.

It was clearly the duty of the captain, as the best mode of securing the lives of the passengers, as soon as it was ascertained there was danger the boat would go down, to run her ashore, with as little delay as circumstances would allow. In the adoption of this course, the law will hold him to reasonable promptitude. And if, from indecision or gross neglect of duty, he omitted to give the proper order in time, and as a consequence, the lives of passengers were lost, he is responsible for that result.

It is therefore an important inquiry, whether there was unreasonable delay in giving the order to run ashore. There is some variation in the statement of the witnesses, as to the

time that elapsed between the collision and the giving of this order. Hawk says, this time was between twenty-five and thirty minutes; Kimball thinks, that about twenty minutes after the boat struck, he heard the captain say, he was about to run the boat ashore; Dwight says, that in about fifteen minutes after the collision, the boat was under headway for the land; Hubbard thinks, from twenty to thirty minutes elapsed; Stern states the time at from ten to fifteen minutes; Mrs. Bradbury thinks it was twenty minutes; Church says, he was on deck within fifteen minutes after the boat struck, and she was headed for shore; Mr. McIlvane says it was twenty minutes after the collision, before he heard there was a leak; Seymour gives it as his opinion, the time did not exceed eight or nine minutes; and Lytle says, the schooner sunk in ten minutes after the collision, and that the boat started for shore immediately after. Capt. Thomas says, the schooner went down in ten minutes, and he supposes the boat started for shore as soon as it could be done.

It is in evidence that after the discovery of the leak, an attempt was made to stop it, by forcing mattresses and bed clothing into the hole, from the inside of the boat, and also to check the inflow of water by passing a sail over the bow; but both attempts were unsuccessful. It also appears, that strenuous efforts were made to keep the boat afloat, by putting the pumps to work, and by bailing, but without avail. And it is also proved that after the order was given to head the boat for the shore, every possible effort was made to increase her speed, by making all the steam that could be made, and that the firemen and engineers remained at their posts, doing their duty, till the fires were put out by the water, and the engine stopped.

There seems to no doubt, from the opinion of the experts, that the captain was right in directing the boat for the pier at Conneaut, although that was not the nearest point of land in a direct line from the boat. The experts also concur in

the opinion that the defendant, Warner, was in the strict line of his duty, as a humane seaman, in providing for the safety of the crew of the sinking schooner, by transferring them to his boat. And, in so far as any delay occurred from his attention to this duty, he is not liable to censure.

Upon the whole, the jury will judge, taking all the circumstances into view, whether Capt. Warner conducted with reasonable promptitude in giving the order to run the boat ashore.

Without any further comments on the evidence, the case is now committed to the jury. If satisfied, from the proof, the defendants are guilty of "negligence, misconduct, or inattention," and that human life has been lost thereby, it will be the duty of the jury to return a verdict of guilty. And here it may be proper to remark, that is not claimed—nor does the evidence afford the slightest ground for such an assumption—that the defendants, or any of them, were actuated by any malicious purpose, as connected with this unfortunate disaster. And, in some respects, it is clearly proved, they were active and prompt in attending to their duties after the collision took place, and that their conduct was highly meritorious.

It is also proper that I should remark, that the defendants are entitled to the full benefit of the evidence which they have adduced, proving their general good professional characters. And in reference to allegations of negligence or misconduct, concerning which the jury may be in doubt as to weight of the testimony, the fair professional reputations of the defendants, may properly have such weight as to turn the scale in their favor.

Verdict of acquittal.

RAYMOND v. LONGWORTH.

A copy of an official letter of instruction from the Auditor of State to the County Auditor of Hamilton county, certified by the latter to be a true copy, is admissible as evidence.

If the list of lands forfeited for the non-payment of taxes, required by law to be forwarded by the Auditor of State to the proper county Auditor, is not made out and authenticated according to law, the subsequent proceedings are void.

Such list must be authenticated by the seal of the office of the Auditor of State.

The signing of such list as follows:—J. B. Auditor of State by J. B. T., without any designation of the latter as chief clerk of the Auditor's office—is not a signing within the requirement of the statute.

The tract in question was entered on the tax list, and so described in all the subsequent proceedings as "five acres in sec. 24, T. 4, R. 1." Held, that the tax sale is void for the vagueness and uncertainty of the description.

Mr. Raymond for plaintiff.

Messrs. Stanberry and Noble for defendant.

OPINION OF JUDGE LEAVITT.

THIS is an action of ejectment to recover a tract of five acres of land, near the city of Cincinnati. To prove title to the premises the plaintiff offered:

1st. A deed from the Auditor of Hamilton county to Charles Phelps, dated February 12, 1845, reciting that said tract having been duly forfeited and re-forfeited to the State of Ohio for the taxes, interest and penalty for the years 1837 and 1838, had been duly sold to said Phelps pursuant to the statute.

2d. A deed from said Phelps to Daniel Raymond, dated December 10, 1845.

3d. A deed from Daniel Raymond to the lessor of the plaintiff, dated June 12, 1848.

The defendant then offered an abstract from the records of the Auditor's office of Hamilton county, showing the proceedings in the forfeiture and sale of said tract. This abstract sets forth, that said tract had been entered on the tax list of said county for the year 1837, in the name of James Cooper, and is described, on said list as "five acres in section 24,

Raymond v. Longworth.

Township 4, Range 1," and that having been delinquent for that and the following year, the tax, interest and penalty being added, it was offered for sale—and remaining unsold, was returned to the Auditor of State as forfeited; and, that a list containing said tract among others, was afterward transmitted by the Auditor of State to the Auditor of Hamilton county, with instructions to sell the same according to the requirements of the statute. The abstract also exhibited the fact, that said tract, having been duly advertised, was sold on the 11th of December, 1843, to the said Phelps.

As a part of said abstract, there is a copy of the letter of instructions from the Auditor of State, appended to the list of forfeited lands, transmitted to the Auditor of Hamilton county in the following words:

“ AUDITOR OF STATE’S OFFICE,
Columbus, June 5, 1843.

AUDITOR OF HAMILTON COUNTY:

You will carefully examine the foregoing list, and strike from it such lands or lots, as you may know to be erroneously forfeited, taking care that none such escape the duplicate of taxation.

You will then proceed to advertise and sell the remainder, according to the original act for the sale of forfeited lands, etc.

Signed, *John Brough*, Auditor of State,
by J. B. THOMAS.”

On the part of the plaintiff, the admission in evidence of the abstract referred to, is opposed, on the ground that the above letter of instructions from the office of the Auditor of State is a copy, and not the original letter. The court has no difficulty in overruling the objection to this item of testimony. The letter is an official document, transmitted by the Auditor of State to the Auditor of Hamilton county, received by the latter, and made a part of his official record of sales of

forfeited lands. The original, as an office paper, is in the proper keeping of the Auditor of Hamilton county, which he can not rightfully permit to be taken from his files. It is well settled, that a duly authenticated copy of such a paper is competent evidence. 1 Greenleaf's Ev. p. 103.

This objection being disposed of, the inquiry is presented, whether the abstract referred to shows such a compliance with the requisitions of the statutes of Ohio, in regard to sales for taxes, as will sustain the tax title, under which the plaintiff claims.

It is insisted on the part of the defendant, that the list or abstract of forfeited lands transmitted to the Auditor of Hamilton county from the office of the Auditor of State is defective, in not being authenticated by his seal of office. If this objection is sustainable, it clearly vitiates the tax title set up in this case. The list which the statute requires should be transmitted to the Auditor of State, is the basis on which alone the County Auditor is authorized to sell for taxes. And if the requisitions of the law have not been strictly complied with in this respect, all the subsequent proceedings are void.

The Supreme Court of Ohio, in the case of *Hannel v. Smith*, 15 Ohio Rep., 134, have decided that under the tax law of 1842, it is necessary that the list of forfeited lands required to be forwarded to the County Auditors should be authenticated by the seal of the Auditor of State. And that court also held, that if the act of 1842 did not require this formality, it would be necessary, under the act of January 31, 1831, prescribing the duties of the Auditor of State, and providing, among other things, that he shall keep a seal of office, and that "all official copies taken from the records or other documents in his office, shall be under said seal, and shall be certified and signed by the Auditor." As the list of forfeited lands is a matter of record in the office of the Auditor of State, it follows that a copy from the record must be verified by his official seal.

The proceedings in the tax sale are also objected to as

invalid, on the ground that the list of forfeited lands is not officially signed by the Auditor of State. It is signed *John Brough, Auditor of State, by J. B. Thomas*, without any designation that the signing was by the latter, in his capacity of Chief Clerk in the Auditor's office. By the ruling of the Supreme Court of Ohio, in the case before cited, this signing is insufficient; and in the case of *Minor v. McLean*, which was tried in this court, at July term, 1845, reported in the *Western Law Journal*, Vol. 3, p. 4, Judge McLean, in giving the opinion of the court, says, that "where the signature of the Auditor of State is necessary, I doubt whether it can be affixed by a deputy. In the absence of the Auditor, the Chief Clerk is expressly authorized to act, by the statute; but this provision is limited to the person who holds the office of Chief Clerk." I think it clear that the signing in question, is not a legal authentication of the act of the Auditor.

The invalidity of the proceedings which form the basis of the tax title in this case, is also urged, on the ground of the vagueness and uncertainty in the description of the land in the tax list, and which runs through all the subsequent proceedings, up to the time of the sale. It is described as *five acres, in section 24, etc.* The statute requires a pertinent description of the land, so that the same may be identified. It needs no argument to prove that the description here given does not meet the requisition of the statute. Indefiniteness in the description of land sold for taxes, constitutes a fatal objection to the validity of tax sales. 2 Ohio Rep., 287; 5 Ib., 458; 15 Ib., 134; 16 Ib., 24.

The position is assumed, in the argument of the plaintiff's counsel, that the whole course of judicial decisions in Ohio, in regard to tax sales, has proceeded from erroneous constructions of the state laws on that subject, and an entire misapprehension of the true principles of public policy connected with it. While I do not yield my assent to this conclusion, I may properly remind the counsel that from a very early period in the history of the national judiciary, the

Supreme Court of the United States have uniformly recognized their obligation to conform the decisions of that tribunal, in all cases involving the construction of state laws, to those of the state courts. It is quite unnecessary to refer to the numerous cases sustaining this remark. I trust, that this course, so warmly commended by the best and wisest men of the nation, and which has done so much to prevent unpleasant collisions between the national and state courts, will long continue.

The jury returned a verdict for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—DECEMBER TERM, 1848.

DUBOIS v. McLEAN.

A deed executed for land, which is held adversely to the grantor, by an individual in possession, is void under the champerty act.

The statute of limitation can only run against the legal title.

A law authorizing executors to sell so much land of the estate, as shall be necessary to pay the debts of the estate, is held by the Supreme Court of Illinois, to be unconstitutional.

In the case before the court, the law passed March, 1819—the sale was made in 1828.

In analogy to the statute of limitations, the power expired. The sale of 1828, was, therefore, void.

The debt on which the land was sold, was contracted by the executor, after the law of 1819 was passed.

OPINION OF THE COURT, BY JUDGE POPE.

THE plaintiff, one of the heirs of Ionissant Dubois, who died in 1846, shows a patent for the land to his father, dated in 1845. The patent is based upon a Governor's confirmation, ratified by the act of Congress, of 1809; by this act the patent is authorized to be issued.

The defendant, to show an outstanding title, produces a deed to Bradley, dated in 1825, from plaintiff. The plaintiff denies that this deed includes the land in controversy, and adduces proof. But it is unnecessary to consider the proof because the defendant does not claim under the deed to Bradley, either immediately or remotely, but adversely to it.

He, therefore, can not avail himself of the estoppel that might defend Bradley. There was an adverse possession to Dubois at the date of the deed; and it was therefore void under the laws against champerty and maintenance.

The defendant shows a deed dated in 1828, from the executors of Dubois, for the premises in controversy, to those under whom the defendant claims. The executors profess to sell the land by authority conferred on them by the act of the Illinois Legislature, of the 4th of March, 1819; the second section was repealed in 1820. This act authorizes them to sell as much of the land as may be sufficient to pay the debts of their testate. He relied upon the statute of limitations of 1835, barring real actions after seven years' residence, under "a connected title in law or equity, deducible of record," etc. He proved residence by some one most (not all) of the time from and after 1839, till suit brought, and that the mill on the premises was run nearly all the time by the hands of the defendant who resided off the land; but does not prove that those who resided on the land had any title. The defendant has not proved a possession of twenty years, nor shown that any one resided on the land under a title in law or equity, deducible of record, etc.

But assuming that either or both these facts were proved, or may be on another trial, what would it avail the defendant? To answer this question, it becomes necessary to look into the plaintiff's title, during the period from 1828, (the date of the deed,) to 1845, (the date of the patent.) It was a confirmation by the Governor, ratified and confirmed by Congress in 1807, when patents were ordered to be issued in such cases, when the Governor had not given the claimants patents. In this and other cases it had not been done. In 1807 the title of plaintiff was an *inchoate*, legal title, and so remained until the examination of the patent in 1845. The legal title was not perfected until the patent was issued. The plaintiff could not maintain ejectment until the land

was separated from the public domain. Before that, the legal title was in the United States. As the plaintiff could not sue, no laches can be imputed to him; therefore the statute of limitations did not begin to run before the date of the patent.

The case of *Stoddard's Heirs*, etc., reported in Peters' Reports, does not contravene this position, because in that case the land had never vested in the United States, having been severed from the domain of Spain before Louisiana was transferred to the United States.

Is the deed of 1828, from the executors of Dubois, operative to convey the estate? This depends upon the construction of the Constitution of Illinois, and the law of March 4, 1819. The legislature assigns no reason for the passage of the law, but gives to the executors of Dubois authority to sell, in such manner as they please, the lands of their testate, for the payment of his debts, restricting them to the sale of no more than enough to satisfy them. Is this law constitutional? The Supreme Court of Illinois, in the case of *Lane v. Dorman*, says no. This is a decision of the Supreme Court of Illinois upon the power of the legislature. It is made the duty of this Court and the Supreme Court of the United States to conform to that decision.

The cases reported in the 2d and 16th Peters's Rep., may seem to conflict with that of *Lane v. Dorman*. Yet the latter case is authority to this Court, as it is a decision of the State Court, giving a construction to the law of the State. But in the cases in Peters's Reports, it is evident that the Supreme Court of the United States relied much upon the justice of the case and the antiquity of the transaction. In the case at bar, the defendant does not attempt to show fairness, but relies upon the presumption that the executors acted correctly after a lapse of eighteen years. But length of time is not available against him who can assert his better title.

Arrowsmith v. Burlingim.

Another view of this case merits notice, viz: At the same session of the legislature at which the law of March 4th, 1819, was passed, viz: On the 23d March, a general law was enacted which authorized executors and administrators under certain regulations, to sell lands for the payment of debts of their testates or intestates. These laws are in *pari materia* and must be construed together: therefore, the regulations in the general law furnished the rule of action for the executors of Dubois under the special law, if it did not supersede it. They have not shown this. Their not doing so is a cause to suspect fraud.

Again, the laws giving power to sell were passed in March, 1819. The sale was made in 1828; nine years. In analogy to statutes of Limitations this power expired in 1824. No reason is assigned for the delay. Hence the sale in 1828 was without authority.

Again, the only debt shown to support the sale in 1828, was one of two hundred and fifty-seven dollars, contracted by the executors in August, 1824. The land sold for more than \$1200—the surplus unaccounted for. The land was sold, not for a debt of Dubois, but, for a debt contracted by the executors, more than five years after the passage of the law, and it is not proved that they had paid that debt. It is no answer that this debt was contracted by the executors in due course of administration, and for the benefit of the estate. it is sufficient that it did not exist March 4th, 1819, and therefore, not embraced by the law. But certainly it was only a liability and not a debt.

ARROWSMITH v. BURLINGIM.

This Court was held by Judge Pope.

Under the limitation law of Illinois of 1835, two things are necessary to the defense: *first*, possession, and *second*, a connected title in law or equity deducible

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of record, etc. Possession without title counts for nothing. The party in possession must have held under title for seven years next preceding the action brought.

To render an Auditor's deed evidence of title to land sold for taxes under the law of 1827, it must be first shown that the requisitions of the law have been complied with.

The statute of Illinois of 1838-9, "to quiet possession and conform titles to land," is not a limitation law. It is a legislative conveyance and adjudication of one man's land to another, and therefore unconstitutional.

Color of title in good faith must be such a title as would pass the land of itself, if a better title be not shown; if it do not amount to that, but is on its face bad, the tenant can not be said to take possession in good faith.

The belief of a tenant that his title is good must be a legal and intelligent belief, and can only be arrived at by an inspection of his title. If the court, on such inspection, pronounce it a "connected title in law or equity deducible of record, etc., the tenant having been seven years in possession, would be protected under the limitation law of 1835. The same would arise where the occupant held under "claim and color of title made in good faith."

Messrs. *Williams* and *Lawrence* for the plaintiff.

Messrs. *Browning* and *Bushnell*, for the defendant.

OPINION OF THE COURT.

THE plaintiff showed title derived from the United States, and possession of the premises by the defendant.

The defendant shows a connected title from the Auditor of Illinois upon a sale of the land for taxes in 1829, under the law of 1827. The deed bears date in 1831. The sale was to Cavalry, who sold the premises to ——— in 1834, and gave a quit-claim deed reciting that he held under a deed from the Auditor upon a sale for taxes. His grantee conveyed by quit-claim deed in 1840, the premises to ——— under whom the defendant claims. No proof is offered that the Auditor complied with the requisitions of the law in making the sale for taxes, beyond what the deed itself imports.

He has also proved seven years' residence on the land next preceding the bringing of the suit, and that he has paid the taxes assessed during that time.

The defendant relies,

1st. On the Statute of Limitations of 1835;

2d. On the Act of 1838-9, entitled "An Act to quiet possessions and confirm titles to land."

The plaintiff contends,

1st. That the defendant has not shown the title required by the Act of 1835, in this: that the Auditor's deed conveys no title, unless supported by proof of his compliance with the law under which he sold;

2d. That the Act of 1838-9 is unconstitutional in this: that it conveys one man's land to another, acting upon the right, not upon the remedy;

3d. That he has not shown claim and color of title in good faith, as required by the law of 1838-9.

The vast amount of property depending upon the principles involved in this case, gives to it unusual importance. It has therefore been argued on both sides with consummate ability and learning. Feeling appeals were made to the sympathies of the court in favor of settlers and in favor of laws of repose. It is only necessary to take a cursory view of the land titles in Illinois to show how little occasion there is for those appeals. The United States was the great land holder. Before it proceeded to sell, it caused the land to be surveyed into quarter sections, numbered by town, range and section. It sold under great precautions against selling the same tract twice; in truth it very rarely happened; so that the patent was for a determinate and surveyed piece of land. Here was simplicity and no confusion. One wishing to own the same tract could ascertain, by application at the proper land office, if it was sold, and to whom. It is true that the patentee or some one holding under him, might sell twice. In such case, the junior purchaser in good faith would be a fit subject for the protection of the statute of limitations. Can this be predicated of him who sets up a claim based upon a deed from a man, or officer, who proposes to convey the property of another? I think not. The case was quite different in Kentucky and Tennessee, and in a part of Ohio. Virginia

and North Carolina sold and granted their land in Kentucky and Tennessee upon private surveys, and described the land in the patent as directed by the patentee, not knowing that some other may not have obtained a patent for the whole or part of the land. Hence there were instances where the same land was covered by several patents. Hence arose endless litigation; and it became the duty of the legislative department to strain its power to the utmost to afford relief to the settlers. They indeed had claim and color of title in good faith. It was the duty of the courts to give full effect to the benevolent policy of the legislature. It is far otherwise in this State. Here, a man takes possession of another's land, lending himself to the unconscionable purpose of depriving him of his acres for cents. This case had been argued for the defendant as if the military tract were alone interested, forgetting that it is a very small part of the State of Illinois, and that land has been sold for taxes all over the State.

The first point of defense, viz: the law of 1835, will be considered. The law provides that every "real, etc., action brought for the recovery of land which any person may be possessed of by actual residence, having a connected title in law or equity deducible of record from this State or the United States, or from any public officer or other person authorized by the laws of the State to sell such land for the non-payment of taxes; or from any sheriff, marshal or other person authorized to sell such land on execution, or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession taken. But, when the possessor shall acquire title after taking such possession, the limitation shall begin to run from the time of acquiring title." The most striking and peculiar feature in this law is that no length of possession without title will protect the occupant. He must have held under title for seven years next preceding the action brought. So, posses-

sion without title counts for nothing. Two things are necessary to the defense. *First*, possession; *second*, a connected title in law or equity deducible of record, etc.

The first the defendant has shown. Second, has he shown a title as required by law? He relies upon the deed from the Auditor. This court is relieved from the construction of the law under which the deed was made, as it has already received a construction by the Supreme Court of Illinois, in 1837, in the case of *Garrett v. Wiggins*, reported in 1 Scam. 343. The court there declares, "it is a settled principle of the common law that a party claiming under a summary and extraordinary proceeding, must show that all the indispensable preliminaries to a valid title which the law has prescribed in order to give notice to those interested and to guard against fraud, have been complied with, or the conveyance to him will pass no title." The court classed the giving notice of the sale among the "indispensable requisites." The authority of the auditor to sell is limited to the lands advertised. "Without proof of this fact, the auditor's deed was not evidence of the regularity of the sale, and consequently conveyed no title to the purchaser." In these remarks of the court, this court fully concurs. The case arose under the law of 1827, and the Auditor's deed is for land sold for taxes under that law; so is the case at bar. It is, therefore, a decision of the point now controverted. But it is said that the case of *Garrett v. Wiggins*, is not in point, because in that case the plaintiff produced the auditor's deed in support of his action of ejectment. In the case at bar, the defendant produces the auditor's deed to protect his possession. In the former case, it was necessary for the plaintiff to make out a good title. In the case at bar, it is only necessary that the defendant should show an appearance of title to protect his possession. It is sufficient answer to say, that the Supreme Court of Illinois made no such qualification, but declared in terms that the deed conveyed no title. But the act of limita-

tions requires a title. How, then, can it be satisfied with an instrument that conveys no title at all? The case of *Skyle's Heirs v. King's Heirs*, throws much light upon the subject. It is a decision of the Court of Appeals of Kentucky, reported in 2 A. K. Marshall's Rep. 384. In that case, the defendant in possession showed a connected chain of title under a junior patent from the commonwealth. The court held, that it would protect him, because it would hold the land upon its face when tried by itself. The State was the great landholder. It gave two grants; the younger would hold if the older were not produced. So he has title deducible of record, etc. But it is far different with the case at bar. The auditor does not profess to sell his own land or have any interest in it. His power is, therefore, a naked power. It must appear that he has exercised it in the prescribed manner. This has not been attempted to be shown in this case. For these reasons the defendant has no title, and is therefore not protected by the statute of limitations of 1835.

Is the defendant protected by the statute of 1838-9, "to quiet possession and confirm titles to land?" The defendant contends that it is in effect a limitation law. If not, that it is within the competency of the legislature to act upon the right in this matter so as to divest it. So much of the act as is material to this controversy, is as follows, viz:

"Every person in the actual possession of lands and tenements under claim and color of title made in good faith, and who shall for seven successive years continue in such possession, and shall also during said time pay all taxes legally assessed on such lands and tenements, shall be held and adjudged to be the legal owner of said lands and tenements to the extent and according to the purport of his or her paper title."

Is it a limitation law? It does not profess to be one either in its title or body. But it is said at the bar, that limitation

laws have their origin as to real actions on the assumption of abandonment. No adjudged case or dictum in support of it has been shown, and none is believed to exist; but abundant authorities can be shown to the contrary. See Blackstone's Com. 188, and following pages. That position, then, is dismissed with the remark, that it is more ingenious than solid.

It is, then, a legislative conveyance and adjudication of one man's land to another. The land passes against all the world not enumerated in the saving clauses. The divesture is declared to depend upon the act of another, not for any fault of omission or commission in the true owner, who is not required to improve the land nor to pay the taxes; and if he did pay the taxes regularly, it would not save his property. Can legislatures in this enlightened age, with written constitutions to restrain them, take from one and give to another his property with or without compensation? It is only necessary to state the proposition in its nakedness to meet refutation.

The owner has disregarded no regulation nor violated any law. Has he received any benefit from the occupant for acts done without his request? The occupant has paid the taxes which might benefit the owner if he had not paid them himself; but as they were paid without request, no action would lie against him for reimbursement. But he has improved and cultivated a portion of the land. (In the case at bar, it is not shown how much, nor that any lasting improvements were made, nor is it necessary under this law.) But he has made improvements. Did they cost much? Probably not, in this prairie country. Was the owner benefitted? It is safe to presume not, if the improved land was prairie. If timber, it would be worse. The scarcity is such that great economy should be observed in its preservation. Most probably the owner was injured. Hence, the occupant can have no legal or moral claim for benefits conferred by his labor.

It was different in Kentucky and Tennessee. The lands there were covered with timber, and required great labor and long time to open a farm. This awakened the sympathy of their legislatures for the occupant. But in Illinois the farms are already open, with scarcely sufficient timber for building, fuel and fencing. So, sympathy is misplaced when invoked in behalf of occupants in Illinois. But the great question must be met fearlessly, but with a profound sense of the responsibility incurred by a judge, when he interposes the ægis of the law in defense of a citizen whose property is divested by a legislative act, which imputes to him no blame, and holds out to him no recompense for his loss. This act requires of him nothing, nor does it hold out threats of forfeiture for the doing or not doing any thing, but gives his property to another in terms on specified conditions.

Is it within its constitutional powers? A slight glance at the construction of society may be not without profit in the solution of the problem. Man was sent into the world by his Maker to seek his happiness; furnished with a code of laws, enacted by an all-wise and benevolent God, implanted in his heart. Although those laws were perverted by imperfect man, their perfect beauty and adaptation to the moral government of the world is in a constant course of development as christianity, civilization and true knowledge advances. His rights and obligations had and have their existence in that law. But man's happiness was insecure in his insulated condition. He was inspired with social tastes. The social state promised increased happiness in the security it would afford to his person and property. Hence, the social compact. In this compact it was agreed that man should surrender as many of his natural rights as was deemed conducive to the general good, and received in return the engagement of the society to protect him in his person and property. And for the surrender of the natural right to take redress for wrongs in his own hands, the society agreed to

afford him suitable remedies for the injuries he might be exposed to. These obligations imposed upon the society the duty to establish a government; a legislature, to prescribe rules of conduct; a judiciary to expound them; and an executive, to enforce them.

It would be unprofitable to give here an exposition of the origin and progressive changes in the titles to real estate in England. It is sufficient to say, that, until the latter part of the seventeenth century, they differed widely from ours. With us the tenure is *free and common socage*; the tenure of a freeman. And a freeman may buy and sell at his pleasure. This right is not of society, but from *nature*. He never gave it up. It would be amusing to see a man hunting through our law books for authority to buy or sell, or to make a bargain. The search would be vain. Society indeed may prohibit the making contracts injurious to the common good. This is a salutary restraint upon his natural right. No grant is needed. *Rights* are from nature. Titles and remedies are the invention of society. The latter are changeable at the will of the legislative department. Remedies may be granted or withheld; and as the legislature has none over *it*, there is none to control it. But the former—*rights*—are sacred, and can not be invaded but by upturning the first principles of society; without violating the great, nay the only object and conditions of the social compact. *Magna Charta* only asserted first principles. So the articles of the constitution of this and other states are only recognitions of those principles that uphold all free governments; the violation of which would dissolve the obligations of obedience.

In this enlightened age no government dare do it, without incurring a moral responsibility that no man will dare encounter. The omnipotent Parliament of Great Britain dare not.

This act is so fraught with disaster to the country in the

insecurity of property, etc., that this court must assume that the Legislature was not aware of a tithe of the evils they were entailing on the country if this law were sustained. The principles embraced and put forward in the law is at war with freedom. For the man is a slave whose property is unsafe. This act presents a strong anomaly. If the plaintiff had committed a crime causing forfeiture, his property could not be taken from him but upon a judicial decision; but for no imputed fault it is taken from him by this act without a trial. Hence, in the argument, the defendant's counsel earnestly repelled the idea of forfeiture in this case. The United States sold their lands for a full price, and gave a grant in fee simple unconditionally. It is under a grant of this kind that the plaintiff claims. In case of actual settlers, full payment of the land must be made, and all the favor they have is in the right of pre-emption. In this case the State of Illinois gives without price that which is not her's, but a citizen's. "No person shall be disseized of his freehold, etc., unless by the judgment of his peers or the law of the land." This is only declaratory of first principles. The only value of it is to restrict the government to a particular mode of divesting the title. "The judgment of his peers or the law of the land." The authorities agree that this must be done through the courts.

This law of 1838-9, has been considered thus far as if the defendant rested his defense alone upon seven years' possession, and payment of taxes assessed. But he has an additional reliance. It is insisted that he has shown claim and color of title made in good faith. Connecting the latter part of the sentence with the first, it appears that the Legislature intended a paper title; as it conveys to him all the land to the extent and according to "the purport of his paper title." This is an important point in the case, and so thought the defendant's counsel, who directed to it very great exertions with an ability rarely equalled. They insisted with great

earnestness that the title shown by the defendant was "claim and color of title made in good faith," contemplated by the law; that it appeared fair on its face; that the Auditor's deed was in the form prescribed, and therefore the occupant was warranted in indulging the honest belief that the title was good. But if in fact bad, still that it was sufficient to protect his possession.

In England, title in ejectment, where the defendant shows possession, made no figure but to prove that he was not a wrong doer, and that his possession was adverse. Hence in England and America, under the twenty years' possession, a mere pretence of title might be deemed sufficient to show that the entry was not a trespass, and that he held adversely to the true owner. In such case, there is great force in the argument that it is enough that the occupant believed his title good. In that case, it is the possession that is the principal; the title only explanatory. The statute of Illinois makes the title the principal, the possession only auxiliary. The English decision must be understood to have reference to a different law from the law of Illinois. At the bar, the deed of the auditor has been likened to the grant from the United States or from the State. The difference, however, is manifest. The United States and the State are sovereigns, and every act of a sovereign has all presumptions to sustain it; not so the acts of the auditor. The United States or the State profess to convey their own land; the auditor, the land of another. He, then, stands on no better ground than the sheriff, who is bound to show his authority. The auditor does not profess to be the great land holder, but only to exercise control over another man's property under authority conferred by law; and does not show that he acted in conformity to the authority conferred. Nor has it been proved. (See *Garret v. Wiggins*, 1 Scam. 343; *Thatcher v. Powell*, 6 Wheaton, 119; *Walker v. Turner*, 9 do. 541; *Williams v. Peyton's lessee*, 4 do. 77.) All these cases concur in say-

ing, that unless it appear that the officer or agent pursued his authority, the proceedings are void. [I here take occasion to say that I do not adopt the doctrine intimated by the court in the case of *Garret v. Wiggins*, that the legislature has the power to establish such rules of evidence as will compel the courts to receive the acts of agents as proof, either *prima facie* or conclusive, that they have executed their duties correctly. But that case is not before the court. The remark is made now only to repel the inference that I acquiesced in that doctrine.] It is not surprising that the defendant's counsel failed to furnish the court with an English definition of "claim and color of title," for the reason given above. But the Supreme Court of New York has defined it in the case of *Jackson v. Frost*, 5 Cowen, 354. The court says it must be, as "I understand the law, such a title as the law will *prima facie* consider a good title; otherwise there would be no uniformity." But in Illinois it must be a paper title, and that title must have the appearance of a good title. The consequences which might flow from the doctrine contended for by the defendant's counsel are truly startling. Suppose the defendant's deed had covered the whole of Adams county. Several years' possession of a very small piece would give him all the unoccupied land in the county, if he be released from the obligation of looking into his grantor's title. As the case at bar now stands, the auditor's deed is void, and conveys no title.

Color of title in good faith must be such a title as would pass the land of itself if a better title be not shown; for if it do not amount to that, but is on its face bad, the tenant can not be said to take possession in good faith. For example: If A conveys to B land avowedly the property of C, it is a fraud in B to take the conveyance. If A professes to act by authority from C, or in any other manner, the authority must appear, or, in its absence, it is the duty of B to inquire. The fact of its being confessedly the property of C, is notice

to B; and if he neglect to inquire, but accepts the deed, it is a fraud on C, if A in fact had no authority. That the grantee of Cavarly had notice, is proved by the deed from Cavarly. That the defendant had notice, is plain from the fact that he bought without warranty, which he would not do without the exhibition of the title papers. Three years before his deed, the Supreme Court decided that such a deed conveyed no title, of which he is presumed to have had notice, as the decisions of the Supreme Court of a state are the law, and every man is presumed to know the law of the land. They were purchasers with notice, and therefore fraudulent. The auditor professes to sell, not his own land, but that of another; his authority to do this is a natural inquiry with the purchaser. Among others, two things must exist: *First*, delinquency; *Second*, notice of the intention of the auditor to sell. These inquiries will of course be made by the purchaser, and if he fails or neglects to seek information, it is at his risk; he becomes his own insurer, and can not protect himself under the plea of innocent purchaser without notice.

The land in controversy has been sold by the Auditor for \$1 84 to Cavarly, a little more than a cent an acre. In a contest between Cavarly and the plaintiff, who would sympathize with Cavarly? Can the defendant who purchased with notice claim more? This court will not inquire into the conscience of the man whose morality will allow him to sleep quietly after appropriating to himself one hundred and sixty acres of valuable land for the pitiful sum of one dollar and eighty-four cents. It is sufficient to say that he can not challenge any sympathy of this court. Nor does his grantee stand better. With a full knowledge of the nature of the transaction, he thrusts himself forward to assist Cavarly to consummate the speculation. He had sufficient warning. *First*, Cavarly was a lawyer; if he had no doubt of his title, he would have given a general warranty deed, and

would have obtained a sound *price* for a sound *title*; his declining to do so was sufficient to alarm the fears of his grantee. *Second*, it is a notorious fact that there never has been entire confidence in titles derived from tax sales; hence there were different prices for patent titles from tax titles, the latter much lower. *Third*, the uniform decisions of the Courts of the United States and the States, are that the holders of tax titles must show that the officer selling had complied with all the requisites of the laws under which he acted. So universal has this been, that no case has been shown where a tax title has been maintained; nor is it known that any one has been successful in the assertion of such title in any of the states. This was enough, of itself, to put the purchaser on his guard.

Cavaryl, then, and those holding under him, are of equal demerit, so far as to the *paper title*—all holding under the auditor's deed upon the tax sale, and all with full notice.

But it is contended, with great earnestness and ability, that, if the tenant *entered* and *occupied*, believing his title good, his seven years' possession will protect him. This is probably true; but the difficulty is not thereby removed. The question still remains, how is this belief to be established? Not by the declaration of the tenant. Not by his acts, because his motives for them might be other than might be ascribed to him. This is properly a question of law. The belief must be a legal and intelligent belief, and can only be arrived at by an inspection of his title. If the judge shall, upon its inspection, pronounce it "a connected title in law or equity, deducible of record," etc., he would be protected under the eighth section of the act of 1835, called the limitation law. The same would arise where the occupant held under "*claim and color of title, made in good faith.*"

It was well contended by the plaintiff's counsel, that any other construction would subject the title to a trial of the intelligence of the occupant, and could not be decided without

taking the measure of his capacity to judge. This would make the defense good for one man and fail with another; that it could not be known whether or not he would be protected until it could be ascertained what was the state of his intellect. And how is this to be inquired into? The Court can not in any case; and in this case at bar, no proof was offered to the court to enable it to form an opinion. The court then must examine the title offered by the defendant, and decide whether it is such a title as is indicated by the statute. Whatever the law makes it, so it must be assumed that the party regarded it. All men who are allowed to manage their own affairs, are on a level in court, and presumed to know the law.

Judgment for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA.—MAY TERM, 1849.

RAY v. DONNELL & HAMILTON.

An action against one or more persons, for harboring or secreting fugitives from labor, whether brought for the penalty or the value of the slaves, is founded on the Constitution of the United States and Act of Congress.

In such an action, the plaintiff must prove the ownership of the slaves, and that they escaped from his service.

A removal of the slaves from the place where they had been secreted with the view of returning them to their master, so that they were enabled to escape from the pursuit of the master, is a harboring and secreting of them within the Act of Congress.

The circumstances under which they were removed, may be sufficient to show that the person removing them, had knowledge that they were fugitives from labor.

The evidence must preponderate in favor of the plaintiff, to authorize a verdict for him.

Whether a verdict for the plaintiff extinguishes his right to the fugitives, is not a question for the jury. They are to give damages for the injury done to the plaintiff by the acts of the defendants. And if by such acts, the services of the fugitives have become lost to the plaintiff, the value of these services will be the damages sustained.

Where the credibility of a witness is so impeached as to create strong doubts as to the truth of his testimony, the jury may decide the controversy on the other evidence in the case.

Where the general character of a witness has not been impeached, though he may have been contradicted by other witnesses, his general good character can not be proved.

Messrs. *Marshal* and *Davidson* for plaintiff.

Messrs. *Smith* and *Stevens* for defendants.

OPINION OF THE COURT.

Gentlemen of the Jury: This action is founded upon the Constitution of the United States, and the Act of Congress of 1793. As in other and similar cases, the provisions of the Constitution and of the Act should be considered by the jury.

The second section of the fourth article of the Constitution provides, that "no person held to service or labor in one State, under the laws thereof, escaping into another state, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due."

By the third section of the above act, respecting "fugitives from labor," it is declared, "that when a person held to labor in any of the United States, etc., under the laws thereof, shall escape into any other of the said States, the person to whom such labor is due, his agent, or attorney, may seize and arrest any such fugitive," etc. And the fourth section provides, that, "when any person shall knowingly and willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labor, etc., or shall harbor or conceal such persons, after notice that he or she was a fugitive from labor as aforesaid, shall, for either of said offenses, forfeit and pay the sum of five hundred dollars, etc.; saving, moreover, to the person claiming such labor; or service, his right of action for, or on account of, the said injuries, or either of them."

This action is not brought for the penalty under either of the above provisions; but for the value of the slaves. That the plaintiff resides in Kemble county, Kentucky, was the owner of the woman Caroline and her four children, Frances, John, Amanda and Henry, and that they escaped from his

services on Sunday evening the 31st October, 1847, is proved by John W. Coleman, and William Ray, the son of the plaintiff. They described the woman as about thirty-five years of age, of a dark color, and the children as of light complexion, the youngest being the darkest.

On Monday evening the fugitives were discovered by Woodson Clark, a witness, near Clarksburgh, Indiana, in a house nearly filled with clover hay, on Peyton's farm which adjoined that of the witness. His attention was drawn to the house by hearing some one coughing, and he there found the woman and her children. She stated to him that she belonged to Ray, and the witness then recognized them, having seen the woman and some of the children at Ray's, who kept a public house, at the seat of justice in Kemble county. The witness took the fugitives to his own house, and from thence they were taken by his son, who lived near, and to secure them they were placed in a fodder house near the stable. The professed object in secreting the fugitives was, to detain them for their master, to whom Woodson Clark despatched a messenger.

On the same evening the fugitives were removed from the fodder house, and by that means made their escape. Their master, it seems, has never recovered them. And the important question is, who aided them in their escape from the place of concealment.

Judge Hopkins states that early in November, 1847, Luther A. Donnell, the defendant, Robert Hamilton and Cyrus Hamilton, made complaint to him that Woodson Clark had certain colored persons concealed in his house, who did not belong to the neighborhood, and a writ of *habeas corpus* was applied for by Donnell to bring them before the Judge. The writ was allowed, and they were directed by the Judge to apply to Hamilton, a respectable lawyer at Greensburgh, the seat of justice for the county, who acted as deputy clerk, and request him to make out the writ.

On Monday evening, the 1st of November, Coleman, Ray and others who were in pursuit of the fugitives, arrived at Greensburgh. And after taking refreshments, making inquiries respecting the fugitives, they set out for Clarksburgh in company with Joseph McKinney, at about eight o'clock in the evening. After riding about nine miles, hearing the tramp of horses in their rear, traveling at a rapid rate, they halted under a shade, at one side of the road. Two men passed them riding on a fast trot, with a passing salutation.

Having had their suspicions excited, Mr. McKinney and his company resolved to keep pace with them. McKinney knew that Donnell was in Greensburgh when they left it, and he afterwards found that Donnell was one of the men who passed them, and that Robert Hamilton was the other. They traveled together a short distance, when, after a consultation between the two, Donnell turned off the road, but Hamilton continued about two miles further and then turned about. This was between twelve and one o'clock at night. Hamilton left them about three quarters of a mile from Woodson Clark's.

John Emry says that on Monday evening, November 1st, 1847, Donnell put into his hands, between midnight and daylight, a writ of *habeas corpus*. Witness was a constable, and acted as deputy sheriff, and he accompanied Donnell immediately to Woodson Clark's; on the same night, Woodson Clark states, at about three o'clock, Luther Donnell, Emry, a constable, William Hamilton, one of the defendants, and his brother Robert came to his house. Donnell said to him that he had a warrant to search his house for certain negroes; the witness lighted a candle, showed him through the house, and not finding any one, Donnell said to Hamilton, they are not here, they must be at one of the sons of the witness. They left in the direction to his son Richard's

house, Donnell saying to Hamilton, the other defendant, that he would have them that night, and they rode ahead of the witness and others, who for some distance went the same road. Richard Clark's house was one mile and a quarter, as the road run, from that of his father's.

Richard Clark swears that on Monday evening the fugitives being in his fodder house, he kept a watch to see who might attempt to remove them. His intention was, as he states, to retain the fugitives that they might be returned to their master. Between three and four o'clock on Tuesday morning, the witness, being on the watch, saw two men approach. To prevent his being observed he hid himself in the fence corner. The moon had risen an hour and a half or two hours, and gave considerable light. The men entered the fodder house, and in a few minutes came out with the woman and her children, passing close by the place where the witness was concealed, on the opposite side of the fence. They passed between him and the moon, and he saw them so distinctly as to satisfy himself, that they were Donnell and William Hamilton, the defendants. Donnell was nearest him, and he is more confident as to him than as to Hamilton. Donnell was carrying the youngest child. On cross examination the witness said, possibly, he might have been mistaken as to the persons, but he was satisfied in his own mind that he was not. Donnell wore a mixed jean frock coat. The houses of the witness and Donnell's are about one fourth of a mile distance from each other.

At the date of these transactions Peter Noel lived with Donnell, and he states that Donnell told him that he had placed negroes around Woodson Clark's house, at the time of his being there with the search warrant. Emry, a witness, saw the negroes around the house of Clark. Donnell told Noel if it had not been for him the fugitives would have been safe with their master. On Monday, while Donnell was

absent at the Sandwich meeting house, three or four negroes called at his house to see him. Shortly after Donnell's return home in the evening, he left, as he afterward informed the witness, for Greensburgh, to obtain a search warrant for the negroes. Donnell was absent on Monday night, and did not return home until about half an hour before Tuesday morning. On Tuesday morning William Hamilton breakfasted with Donnell, and they left Donnell's house together, between eight and nine o'clock on that morning. Witness heard Donnell say that the negroes belonged to Ray; at what time this was said he does not remember.

After breakfast, and before they left Donnell's house, witness heard Hamilton say to Donnell, we will go to Clarksburgh, and baffle the men there in pursuit of the negroes, until they could get the negroes off. Donnell said to the witness that he carried victuals to the fugitives on Tuesday, who were then on the road between Brookville and some other place. The witness, it seems, had a quarrel with Donnell in the fall of 1848, and also a quarrel with his son.

There is some confusion, if not conflict, in the testimony in regard to Donnell's being seen, at home, at the horse mill of Snelling, and at other places on the road, on Tuesday morning.

Granville L. Hindle lives near to Donnell. Witness having said that had he been there, he would have taken back the negroes to Ray, Donnell replied that witness would not have done so, as the children were as white as either of them.

Robert Coleman states that Donnell said to him, "the negroes are safe, and Ray will never get them."

To break the force of the evidence of the plaintiff, many witnesses have been called and examined by the defendants.

Robert M. Stout states that while Noel was living with Donnell, about two months after the slaves were taken from Clark's, Noel asked witness to tell him about the negro scrape. The witness said, why do you not ask Donnell?

Noel replied he had tried him, but could get nothing out of him.

Jackson Braden heard Noel say, when inquired of why he did not ask Donnell about the negroes, that he might as well ask the old fellow as Donnell.

Peter Noel, on being recalled, denies that he ever made the above statements to Robert M. Stout and Jackson Braden. He says the statements of Donnell were made to him in the presence of no other person.

Robert Coleman and twelve other witnesses, being called, impeach the credibility of Noel. His credibility is sustained by about the same number of witnesses.

Robert M. Stout says that in the spring of 1848 he heard Richard Clark say, in the presence of Donnell, that he was satisfied, from Donnell's saying so, that he did not assist in taking the negroes out of the fodder house. That he had known him many years, and had no reason to doubt his word.

Elisha Hobbs states, that on the Friday evening of the escape of the fugitives, he had a conversation with Richard Clark in regard to Donnell being at his place on Monday night, when he said he did not know certainly that Donnell was there. That it was so dark that he could not tell a white man from a black one. That he believed Peyton's negroes took the fugitives away, and that if Peyton did not take care he would have to pay for the negroes.

James Petigrew says that he lodged with Richard Clark shortly after the fugitives had been removed. That Clark observed to him there had been a good deal of excitement in the neighborhood respecting some slaves found by his father. That he, through false pretences, had induced them to come to his fodder house, with the view of enabling them to escape. And he observed that his father was independent in his circumstances, and did not need the reward for the apprehension of the negroes.

He also said that he did not tell the colored persons in the neighborhood where he had placed the fugitives, but that they understood where the place was, and that the fugitives were removed by them. Clark said the negroes were not then more than half a mile from that place, and he must go and see if they were safe. Witness proposed to go with him, but Clark objected, as he was a stranger in the neighborhood, and the Kentuckians were about. Clark returned about ten o'clock at night, and said the negroes were safe, and on their way to Richmond. He requested witness not to speak of the matter, as it would displease his father, and would be, in a pecuniary point of view, a disadvantage to him. And he also observed, if the facts were known, he might be made liable for the slaves.

David Stout says the day after the negroes were taken away, or the next day, he met Richard Clark in the road, near his house, who inquired if he had seen any negroes, etc. On being answered in the negative, he observed that he had had a negro woman and children at his house the night before, and that the negroes came and took them away; but that the woman and her children were still in the neighborhood.

Richard Clark on being recalled says he has no recollection of having made the statements in conversations sworn to by Robert M. Stout, Elisha Hobbs, James Petigrew and David Stout. He remembers that he conversed with those persons, but denies that he made the remarks attributed to him.

These are the material facts proved, on which you, gentlemen, are to determine this controversy. There seems to be no doubt that the fugitives were the slaves of the plaintiff, and that they escaped from his service in Kentucky. They answer the description of the plaintiff's servants, the woman confessed that she belonged to him, and they were known to be his by Woodson Clark, who had often seen them at the plaintiff's house. And in addition to this, Donnell, one of

the defendants, admitted that they belonged to the plaintiff. And there is no doubt that the fugitives have been lost to the plaintiff. The great question is, whether the defendants removed them from the fodder house or aided in removing them.

This fact rests mainly on the statements of Richard Clark and Peter Noel, connected with the circumstances of the case. If the jury shall believe these witnesses, the defendants are guilty. But the credibility of these witnesses has been assailed. Clark is contradicted by his own confessions to the two Stouts, to Hobbs and especially to Petigrew. The statements of Clark made, as they were to these witnesses, are wholly inconsistent and irreconcilable with what he has sworn to on the trial. This inconsistency goes not only to his acts but to his motives also. From his remarks to Petigrew, it would seem that he aided in the removal of the fugitives, and that to accomplish this object he deceived his father, and thereby got possession of them. And they were taken from the fodder house not by the defendants, but by other persons. Never in my experience have I witnessed so great a conflict of statements, among respectable witnesses. The court have refused to hear evidence in support of the general character of Richard Clark and his father, because they had not been assailed on that ground. They have been contradicted, but that does not enable a witness to offer evidence of general good character.

The jury are the proper judges of the credibility of witnesses. Their statements are made in the presence of the jury, who observe their appearance and the manner of giving their testimony. These are important in enabling you to weigh the evidence, and to determine the credit to which the witnesses are respectively entitled. If conflicting statements can be reconciled, it should be done; but where this is impossible, you must decide to whom credit is due. When the scale shall stand upon an equipoise and there is nothing in the evidence which shall incline it to the one side or the

other, the jury will find for the defendant. And where such a balance may exist in regard to the credit of a witness, the jury will throw his statements out of the case, and decide upon the other evidence.

When we look at the active agency of Donnell in procuring the writ of *habeas corpus* and in serving it, under the denomination of a search warrant, in which Hamilton the other defendant co-operated; and when they were known to leave the house of Woodson Clark together, with an expression by Donnell that the negroes were at one of the sons of Clark, and that they would have them, going in the direction of Richard Clark's at a late hour on Monday night, it is clear that they might have removed the fugitives, as sworn to by Richard Clark. This view is strengthened by the absence of Donnell from his home on Monday night, until a short time before daylight on Tuesday morning; and the defendants being together on that morning at Donnell's, and their subsequent conduct, all conduce to show that they had a most favorable opportunity of doing the act complained of. And they sought this opportunity, it would seem from the evidence, by extraordinary efforts, and a singular combination of circumstances occurred which would have enabled them to perpetrate the act. Whether they are guilty, or not, it is for you to determine. It is no evidence that an individual has done a wrong who had an opportunity of doing it. But, if such opportunity be connected with circumstances, from which an inference may be fairly drawn, of an intention to do the act, and the act be done by some one, the opportunity of doing it becomes an important fact.

Circumstantial evidence may prove a fact as satisfactorily as positive proof. And where the circumstances are of such a character as necessarily to implicate an individual, he is required to exculpate himself by proof.

If the defendants removed the fugitives from the fodder house, and by that means they were enabled to escape; so

that their services have been lost to their master, the defendants are liable in this form of action. That the defendants knew they were fugitives from labor, is shown by the confessions of Donnell, and by the circumstances of the case. To suppose that they could have been ignorant of this knowledge, is to presume against all the facts in the case. Liability attaches from "harboring or concealing" the fugitives. "To harbor" is defined by Worcester to be, "to rescue, to receive clandestinely and without lawful authority." And to conceal is "to hide, to keep secret, to secrete, to cover, to disguise." And by Webster, "to withdraw from the observation, to cover, or keep from sight."

In regard to the damages, should you find for the plaintiff, the court have been requested to charge you, that as a recovery in this case will be no bar to the plaintiff's claim on the fugitives, the damages should be nominal. I can only say that this action is given in the language of the act of Congress, for the injury received. And of this you are to judge. The services of the fugitives are proved to have been worth to the plaintiff, by one witness, fifteen hundred dollars, and by another, fifteen hundred and fifty dollars. Whether a recovery in this case extinguishes the right of the master, is not a matter for your consideration, but the amount of injury received by him, by the acts of the defendants.

It is clear, that the damages recovered in this form of action, are not given as a penalty. The act of Congress gives a penalty to the plaintiff of five hundred dollars against one who has secreted a fugitive from labor, with notice, or for hindering his arrest, or rescuing him after he shall have been arrested.

Slavery is an exciting topic, in whatever form it may be considered; and no political question can be more deeply interesting to any people. But it can only come before us judicially. Here great principles are discussed, and acted on only as they bear upon the rights of litigant parties.

The power to establish slavery, in my judgment, does not belong to the Federal Government. It is not found in the enumerated Federal powers, nor can it be implied from the necessary exercise of any one of them; but as a right belonging to the States respectively, it is recognized. The clause in the Constitution which has been read, and the act of Congress in regard to fugitives from labor, were intended to cover the services of slaves as well as those of apprentices. From the history of the times, we know the recognition of this power in the States, and in this form, was essential to the adoption of the Constitution; and on this principle of compromise, the compact of the Union was formed.

The Constitution has made us one people,—a nation—a great nation;—a nation that stands proudly among the nations of the earth; and, if we shall maintain its principles in the same spirit which led to its formation, our country will be advanced to a height of prosperity, as far beyond that which we now enjoy, as our present position is above that which our fathers occupied when the Constitution was formed. If the guaranties of this fundamental law be disregarded, all our hopes for the future, as regards the prosperity, the greatness, and glory of our country must perish.

We must stand firmly by the principles of the Constitution, and maintain the rights secured by it, to the citizens of the States respectively; and, whatever may be the excitement and turmoil in other places, we must here act calmly and deliberately, free from all influences which do not arise from the facts and law of the case.

The jury found for the plaintiff, and assessed his damages at fifteen hundred dollars.

COFFEEN v. BRUNTON.

Where a label or mark of another is used by an individual, with a fraudulent intent to recommend to purchasers an article similar in appearance to one favorably known in the market, an injunction will be granted.

In commercial transactions, good faith is required. And where a deception is attempted to be practiced, by recommending a spurious article as genuine, to the injury of a party, chancery will restrain the aggressor.

In such a case at law, nominal damages will be given where no specific injury has been proved.

In such cases, the inquiry is, whether the label or mark is so assimilated to the label or mark of the complainant, as to deceive purchasers.

And it seems not to be essential that there should be a fraudulent intent proved. This principle as well applies for the protection of foreigners as citizens.

Mr. Norton, for the complainant.

OPINION OF JUDGE MCLEAN.

In his bill, the plaintiff represents that he was the inventor of a certain medicine, called the "Chinese Liniment," at great labor and expense; that the medicine was found to be efficacious in the cure of many diseases; and on being made known to the public, was purchased extensively, so as to afford a great profit to the plaintiff. It was sold in small bottles, with a suitable label, and accompanied by another paper containing directions for taking and applying the medicine in various complaints.

And the complainant represents that the defendant, in the early part of the year 1848, in combination with one John Loree and others, fraudulently issued to the public a preparation called "Ohio Liniment," having upon the bottles containing it, labels, with directions exactly similar to that used by the complainant for his "Chinese Liniment," and that the said Brunton pretends that Loree was the inventor of said Liniment, and so represents by hand-bills and advertisements; and that by these representations, which are charged to be false, the defendant has induced the public to believe that the composition sold by him contains the same ingredients as the "Chi-

nese Liniment," and that by such means it is extensively purchased and used to the injury of the complainant, and the great benefit of the defendant. All which representations are alleged to be false, etc.

The complainant has not obtained a patent for his alleged invention; and if, in this respect, the allegations of his bill be admitted in regard to the invention, yet this gives him no exclusive right of property in the medicine. Any other individual has a right to make and sell the same medicine. An exclusive right, as the inventor, can only be obtained under the patent law, by a compliance with its provisions.

Nor has the complainant an exclusive right to the label, as it is not a book, within the provisions of the statute. On neither of these grounds can the complainant claim an injunction. But if there be found in the representations of the defendant that his Liniment is the same as the "Chinese Liniment," which recommends it to the public to the injury of the complainant, it may be ground for the equitable interposition of this court. Suppose the article sold by the defendant is not only different from the "Chinese Liniment," but greatly inferior to it, the effect must be to destroy in the market the value of the plaintiff's Liniment. And this is an injury for which a court of law can not give adequate compensation. However valuable the plaintiff's invention may be, yet if it be discredited by a worthless article, it would be impossible, in any reasonable time, to restore the public confidence in the genuine article. In this consists the injury; and the fraud arises from the false representations that the composition is the same.

In *Blanchard v. Hill*, 2 Atk. 484, Lord Hardwicke said, "every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it." And he further remarks, "it is not the single act of making

use of the mark that was sufficient to maintain the action, but the doing it with a fraudulent design to put off bad cloths by this means, and to draw away customers from the other clothier." And in support of this doctrine he referred to Popham, 151, where it was held that an action at law would lie against a cloth-worker for using the same mark as another in the same trade.

This doctrine of Lord Hardwicke is sustained by subsequent decisions. In *Singleton v. Bolton*, 3 Doug. 293, Lord Mansfield said, "if the defendant had sold a medicine of his own under the plaintiff's name or mark, there would be a fraud for which an action would lie." In the case of *Sykes v. Sykes*, 3 Barn, and Cres. 541, it was held that the defendant was liable for attempting to sell an article which he falsely represented as manufactured by the plaintiff. In *Canham v. Jones*, 2 Ves. & B. 318, it was held that the defendant had a right to sell the same kind of medicine, of as good or better quality, than the plaintiff's. The court decided in the case of *Knott v. Morgan*, 2 Keene 213, that a company who run omnibuses, and who were named on their carriages, "The London Conveyance Company," had a right to call upon a court of chancery to restrain another company who called themselves "The London Conveyancer Company," as the words and devices were substantially the same, which would deprive the plaintiffs of profits arising from their established character. And in this case the doctrine of Lord Hardwicke, limiting the interference of the court to cases of fraud, is much shaken, if not overruled.

In the case of *Goutt v. Aleploghler*, 7 American Jurist, 277, "the vice chancellor granted an injunction restraining the defendants from manufacturing and vending watches with the word 'Pessendede,' in Turkish characters, or with the plaintiff's cypher engraved on them, the plaintiffs having been in the habit for many years of supplying watches for the Turkish markets with those marks and words upon them,

although the defendants used such word and cypher with their own name, and not the names of the plaintiffs, and the word 'pessendede' signified in the Turkish language, 'warranted.' The court then held that in this case the principle of fraudulent representation applied." And in *Millington v. Fox*, 3 Mylne & C. 338, the court carried the doctrine further, for they granted an injunction where certain marks had been used in ignorance of any other right.

From the above, it would seem that an intentional fraud is not necessary to entitle the plaintiff to protection; but that where the same mark or label is used, which recommends the article to the public by the established reputation of another, who sells a similar article, and the spurious article can not be distinguished from the genuine one, an injunction will be granted, although there was no intentional fraud. And I am inclined to think that this is a correct view of the principle; for the injury will be neither greater nor less by the knowledge of the party. If he has adopted the same mark which will cause his article to be taken for another in the market which is known and approved of, it is an injury which the law will redress. In commercial dealings the utmost good faith should be observed, and no one is permitted to go into the market with a deception of this character, so as to profit by the ingenuity, good faith, or established reputation of another. "A man may have no abstract right to use a particular mark," as was remarked by Judge Creswell, in *Crawshy v. Thompson*, 4 Mann & Grang, 386, but when such a mark is used to deceive purchasers, to the injury of a third party, an action will lie. In *Bell v. Locke*, 8 Paige, John. Rep. 75, Chancellor Walworth held a fraudulent use of the mark was a ground for relief.

Day & Martin, manufacturers of blacking, complained of Binning, who also manufactured blacking, and sold it in bottles similar to theirs, and labelled with this difference only: Day & Martin described their blacking as "manufactured"

by Day & Martin, whilst Binning described his as "equal to Day & Martin's." The words "equal to" were printed in very small type. In that case an injunction was granted, on the ground that the label of the defendant would deceive the purchaser. It has been stated by Judge Story, that where one of our own citizens fraudulently uses the mark of a foreigner, to recommend an article of domestic manufacture, he is liable to an action. In this respect there is no difference between a citizen and an alien.

In an action at law, *Blofield v. Payne*, 4 Barn. & Ad. 410, the declaration stated that plaintiff, being the inventor and manufacturer of metallic hones, used certain envelopes for the same, denoting them to be his, and that defendant wrongfully made other hones, wrapped them in envelopes resembling the plaintiff's, and sold them as his own, whereby the plaintiff was prevented from selling many of his hones, and they were depreciated in value and reputation, those of the defendant being inferior.

And the court held that the plaintiff was entitled to some damages for the invasion of his right by the fraud of the defendants, though he did not prove that their hones were inferior, or that he had sustained any specific damage.

Where a right is invaded by a fraudulent act, though no specific injury be proved, some damages, at law, must be given. In the case above cited, on a motion for a new trial, Judge Patterson said, "it is clear the verdict ought to stand." A publisher of a magazine or newspaper, can not assume the name of one previously published, or represent the new publication as a continuation of the former, when it is not so. *Hogg v. Kirby*, 8 Ves. 213.

In the case under consideration, in his label, the plaintiff calls his medicine the "Chinese Liniment;" the defendant calls his the "Ohio Liniment;" but from the body of the label, and of the directions for the use of the medicine, it is clear that the language of the defendant is so assimilated to that of

the plaintiff, as to appear to be the same medicine, the alterations being only colorable. There would seem to be no doubt that the intention of Loree, who prepared the Liniment sold by the defendant, as his agent, was to avail himself of the favorable reputation acquired by the "Chinese Liniment," in the sale of his; and by most persons it would be received as the same medicine. From the hand-bill published by Loree, the medicine sold by him is asserted to contain the qualities or ingredients of the "Chinese Liniment," and some other ingredient which renders it more efficacious. In his bill the plaintiff avers that this allegation is false; and especially in saying that the "Ohio Liniment" contains the ingredients of which the "Chinese Liniment" is composed.

The case is considered as coming within the principles above cited, and an injunction is granted to enjoin the defendant from using the label or directions accompanying the liniment he sells, as aforesaid, or other labels or directions, or any advertisements or hand-bills respecting the same words and sentences which are used by the complainant in his label and directions, and which tend to produce an impression on the purchaser and the public that the liniment sold by the defendant contains the same ingredients as the "Chinese Liniment," and is, in effect, the same medicine.

On the filing of the answer, a motion will be heard to dissolve the injunction.

JONES AND HARDY v. HAYS.

It is unnecessary in a declaration or plea to set out the law of any State, as the courts of the United States take notice of such laws without pleading or proof.

The statute of limitation is the law of the forum.

The replication is not good which does not answer the plea. To a plea of the statute of limitations the plaintiff replies that he lived in another State. This not an exception within the statute.

Mr. Sullivan for plaintiff.

Mr. Marshall for defendant.

OPINION OF THE COURT.

THIS action is brought against defendant as the indorser of a promissory note to the plaintiffs, given by William Stewart to the defendant, promising to pay Hays, or order, twelve hundred and nineteen dollars, eight months after date, which note, before it became due, the payee indorsed to the plaintiffs and one Moses Stewart, since dead.

At the maturity of the note, demand of payment was made and due notice of the non-payment given to the defendant.

The plaintiffs in their declaration set out the substance of the act of Pennsylvania, where the note was given and assigned, showing that it was negotiable.

In the defense, several pleas were filed, and among others, the 5th plea alleged that by the 6th sec. of the act of the General Assembly of Pennsylvania, suit should be brought on the promissory note specified, within such time as is appointed for commencing or suing actions upon the case by the act of the 11th and 12th of Anne, which required suit to be brought in six years, and that he did not promise within that time.

The 6th plea set up the same act. To these pleas the defendant demurred.

It was not necessary to set out in the declaration or plea the statute of limitations of Pennsylvania. This may be necessary in the State courts, but the judges of the courts of the United States take notice, without pleading or proof of the laws of the respective States.

The rule is well settled that the statute of limitations, is the law of the forum; and of course, must be the statute of the State where the suit is brought.

The 4th plea stated that the plaintiff and one Moses Atwood, in his life time, impleaded the maker of the note, William Stewart, by foreign attachment, under which the Sheriff attached twenty-five tons of iron, the property of

Stewart, when it was agreed by the plaintiffs and defendant Stewart, that twenty tons of iron, of the value of fourteen hundred dollars, in full satisfaction of the said debt, interest and costs, and the same was delivered by said Stewart, and accepted by said plaintiffs, and their deceased partner, in full satisfaction and discharge of said debt, interest and costs; and was so indorsed by said sheriff and made a part of his return and a part of the record of said cause in the circuit court at Madison, in Indiana, and said cause was dismissed; which judgment of dismissal and return of said sheriff and proceedings remain of record, etc.

To this plea the plaintiff replies that the foreign attachment mentioned in said plea and commenced by plaintiffs and said Atwood, against the goods and chattels, etc., of the said Stewart, was commenced and carried on to its termination in Jefferson county circuit court by said defendant, in the name of said plaintiffs, at the request of said defendant and for his indemnification as indorser of said note and for his benefit, and was commenced and carried on by the permission of said plaintiffs at defendant's request, for the purposes aforesaid, and for no other purposes whatever; and this they are ready to verify.

To this replication the defendant demurs.

The replication does not answer the plea, and is therefore bad. The plea alleges an accord and satisfaction to the plaintiffs; which the plaintiffs answer by saying the suit was carried on, etc., for the benefit of the defendant Hays, the indorser to the plaintiffs, and for his indemnity and for no other purpose.

The truth of the plea afforded the best possible indemnity of the defendant as indorser—the payment of the debt. The demurrer is, therefore, sustained.

The 7th plea is to the third count in the declaration, that the defendant did not within six years next before the commencement of this suit, undertake and promise, etc.

To this plea the plaintiffs reply that the said undertakings and promises of said defendant were made by the indorsement and delivery to said plaintiffs of the said promissory note and in the State of Pennsylvania, and that by the laws of that State the note was negotiable. That demand of payment on the note when due was made, protest and notice.

To this replication the defendant demurred.

If the note be negotiable in Indiana, the statute of limitations does not run against it, such paper being excepted by the statute.

But the statute could only begin to run against the plaintiffs from the time of demand, and notice. Prior to that the defendant was not liable to be called on or prosecuted for the amount of the note. As before remarked, the statute of Indiana must govern and not the statute of Pennsylvania. The replication is no answer to the plea of the statute. A residence out of the United States is an exception in the statute, but not a residence in any other State of the Union.

The plaintiffs must take issue on the plea or set up a new promise. The demurrer is sustained.

Leave being given to amend the pleadings, etc, the parties put the cause before the jury on the merits.

And it appearing from the statement of Mr. Stevens and the memorandum in writing, that the iron, on the discontinuance of the attachment, Mr. Stevens being of counsel in that case, was not received in payment, but that it was agreed to be sent to St. Louis, to a house named by the plaintiffs, and sold, and the proceeds applied to the payment of the note. The iron was so forwarded, but the article fell in the market, and the proceeds of the sale were less than was anticipated.

The court instructed the jury that the house in St. Louis, being selected by the plaintiffs, was thereby constituted their agent for the sale of the iron, and that a sale being made would entitle the defendant to a credit on the note.

The jury found for the plaintiffs, on which verdict judgment was entered.

PHILLIPS v. COMBSTOCK.

A special plea or a notice must be filed, thirty days before the term, in a patent case, or the plaintiff will be entitled to a continuance.

The option to file the general issue and give notice, does not take away the right to set up the special matter in a plea.

Mr. *Baird* for the plaintiff.

Mr. *Judah* for defendant.

OPINION OF THE COURT.

THIS is an action for the violation of a patent right. The defendant filed a special plea, setting up that the right was not in the plaintiff. A previous discovery and that the right was of no value. And a question was raised whether a special plea could be filed, or whether the plaintiff was not bound to plead the general issue and give notice as authorized by the statute.

The court held that a special plea may be filed. That a right to plead the general issue, and give notice by the statute was an enlargement of the defendant's mode of defense, but that it did not take away his right to plead specially. But the court held also, that as the plea was not put in thirty days before the term, the plaintiff was entitled to a continuance. The statute provides that the notice under the general issue shall be filed thirty days before the term. This entitles the plaintiff to the thirty days whether the matter be set up by a plea or notice.

CASE v. REDFIELD & PUETT.

It is not essential to the validity of an assignment of a patent right between the parties, or as against strangers, that it should be recorded in the patent office.

The record is notice to purchasers.

An ordinary assignment will not convey to the assignee an interest in the renewed patent.

The renewal is for the benefit of the inventor, and an interest in it before the renewal must be especially assigned.

The individual who holds the original right patented, and also an improvement on that right, must assert his entire right in an action for an infringement.

To show a violation of the patent, the declaration need only aver that the defendant has constructed, used, and sold to others, the things patented.

Messrs. *Smith* and *White* for plaintiffs.

Messrs. *Judah* and *McGaughey* for defendants.

OPINION OF THE COURT, BY JUDGE HUNTINGTON.

THE plaintiff claims to be the assignee of the patent right granted to Zebulon and Austin Parker, on the 18th October, 1829, for the term of fourteen years, for the invention of "a percussion and reaction water wheel for mills," etc. And he alleges that on the 27th of June, 1840, the said patentees having invented a new and useful improvement on the above right, a patent for the improvement was issued to Zebulon Parker and Robert McKelvey, administrator of Austin Parker, deceased, in trust for his heirs at law, for fourteen years.

On the 31st July, 1841, McKelvey, for the consideration of twenty-five hundred dollars, assigned to Zebulon Parker, "all the right, title and interest which said heirs had in said invention and improvement, as secured to them by said letters patent, for the whole of the United States, with certain exceptions, and for the use and behoof of his legal representatives, for which letters patent were or may be granted for said improvements, as fully and entirely as the same would have been held and enjoyed by said heirs had that assign-

ment and sale not been made." Other assignments were made down to the right asserted by the plaintiff.

And the plaintiff avers that the defendants have infringed his right, as stated under the patent. The defendant demurs to the declaration, and assigns, as causes of demurrer, the following:

1. "That the declaration does not show that any assignment was ever made by the administrator of Austin Parker, deceased, of the extension of the original patent granted to Zebulon and Austin Parker, nor does it show any right in the present plaintiff in but one-half of the present patent."

2. "The declaration is double and multifarious in this, that the plaintiff sues for the invasion in each count, of two separate and distinct rights growing out of separate and distinct patents, that is to say, for the invasion of the original patent granted October 19th, 1829, and also for an invasion of the patent for an improvement granted 27th June, 1840."

3. "The declaration does not set forth in what or by what means, the defendants violated the patents set forth."

There is also a demurrer to the last count in the declaration, which sets out the assignments, but does not aver that they are recorded in the Patent Office.

The assignments are set out in the declaration originally filed, and they are stated to have been recorded in the office; but this can not obviate the objection made by the demurrer to the last count.

By the law of Congress, the assignments are required to be recorded; but the effect of an omission to have them recorded is not declared. It has been held by Mr. Justice Story, that a failure to record an assignment was not essential to its validity as between the parties and against strangers, and was only necessary by way of notice to purchasers. The same construction has been given to the statute by several Circuit Courts of the United States, and we think it is the true one. The demurrer to the last count in the declaration is therefore overruled.

In regard to the objection first made on the special demurrer, that there has been no assignment of the interest in the heirs of Austin Parker, in the extended patent, it must be admitted that there has been no assignment of it since the patent was extended; and if there was no assignment of this interest before the extension, the truth of the fact is established, whatever may be its legal effect.

In the case of *Wilson v. Rousseau*, 4 Howard, 646, it was held, that the extension of the patent was given for the benefit of the original inventor or his representatives to compensate him for his expenditures, labor and ingenuity in the invention, and in perfecting it; and that an ordinary assignment of the right in the patentee would not convey any right in the extended patent. But, that such an interest, when intended to be assigned, must be expressed.

The original patent of the Parkers was extended for seven years, on the 4th of October, 1843. And, since the extension, there has been no assignment by the heirs of Austin Parker. But the plaintiff relies upon the assignment of McKelvey to Zebulon Parker, on the 31st July, 1841, as transferring the interest of the above heirs in the renewed patent. And it would seem from the language of that assignment this construction of it is sustainable.

It appears at the time of this transfer the original patent had but little more than two years to run. And, although one-half of the improvement on the original patent was included in the assignment, yet the improvement without the original invention could not be used, and would be of little value. The sum of twenty-five hundred dollars was the consideration named in the assignment. From this it would be reasonable to infer that the entire interest in the heirs, present and future, in the invention, was intended to be conveyed; so large a sum would not have been paid for one-half of the improvement on the original right, and a moiety of the original patent which would expire in two years.

The operative words of the assignment show the intention

of the parties. They are, "all the right, title and interest which said heirs had in said invention and improvement as secured to them by said letters patent, for the whole of the United States, with certain exceptions, and for the use and behoof of his (Zebulon Parker's) representatives, for which letters patent were or may be granted for said improvements, as fully and entirely as the same would have been held and enjoyed by said heirs had that assignment not been made."

Here is not only a present but a future interest assigned. An interest secured by the present letters patent, or by patents which may (hereafter) be granted for said improvements. This was intended to transfer the right under a renewal of the patent. No other construction can be given to the words used. They can not be made to apply to any correction of a supposed error in the specifications or claims of the patent. Under the law when this assignment was made, the patent was not void for claiming more than was invented. And it is not pretended that there is any want of precision in the specifications.

Under the Act of 4th of July, 1836, Sec. 18, for the extension of a patent, it may have been supposed that a new grant would be issued. But a much shorter mode has been adopted by an indorsement on the original patent.

The second ground of objection in the special demurrer that "the declaration is double and multifarious," is not sustainable.

The wrong complained of is for an infringement on the improved patent, not for a violation of the original patent or of the improvement upon the original grant, but of the entire right, united in the plaintiff, by the different patents and assignments. The right set up is an entirety, and being united in the same individual is not susceptible of a division. Had he divided his cause of action, claiming damages in one case for the infringement of the original patent, and in another for an infringement of the improvement, the actions

A. McNaughton v. William Cassally.

could not have been sustained. As well might different actions be brought for trespass upon a close, on the ground that the land was held under distinct titles. The injury done was to the entire close, and that constitutes the ground of the action.

It may be admitted that two defendants can not be united in the same action, where each has infringed distinct patents: for in that case there could be no joint defense. There would be no right common to the defendants, and consequently both would be subjected to additional costs and delays by the joinder of the two. But where the original patent and the improvement on it are united in the same person, they constitute a whole, an entire right, and must be asserted as such in an action for an infringement.

The other ground of demurrer, as to the violation of the plaintiff's right is answered by the declaration. The wrong done is alleged in the usual form, that the defendant "made, constructed, used and vended to sundry persons," etc., the said invention. The special demurrer is overruled.

A. McNAUGHTON v. WILLIAM CASSALLY.

A contract to deliver three thousand hogs, cleaned, at such times as should be required by the purchaser, not exceeding seven hundred in a day, may be waived by receiving a less number, and giving notice, under the contract, to furnish at subsequent periods,

On the failure of the plaintiff to deliver, the defendant might have put an end to the contract, and refused to receive any more.

This having been waived by defendant, he can not afterwards, set it up as matter of justification or defense, for not complying with his contract.

After the defendant's agents refused to receive any more hogs, there being one or two wagon loads, at the door of the pork house, ready to be delivered, and a great number killed and cleaned, it was unnecessary to make a tender of the hogs.

If the jury are satisfied that the plaintiff had the hogs ready to be delivered, a refusal to receive any more, was sufficient to charge the defendant.

The damages will be, the difference between the contract price, and the market value of the pork, in Madison, the place of delivery.

Messrs. *Sullivan* and *Chapman* for plaintiff.

Messrs. *Marshall* and *Judah* for defendant.

OPINION OF THE COURT.

THIS action is founded upon a contract of the following import, agreement dated 17th June, 1847—McNaughter sold to defendant and partner, three thousand corn fed hogs, to be delivered on or between the 15th of November and 1st of January, next, at the option of Cassally, at Madison, Indiana, they giving twelve days notice for the delivery of the same, and to pay for the same \$4 62½ per hundred, net weight; said hogs to average 190 pounds net, and no one to weigh less than 140 pounds, at Madison, to be killed one day and weighed the next; payment to be made \$4,900 in advance on security by plaintiff, etc.

This contract was modified on the 8th of November, 1847, so as to make the delivery at Madison, soon as the weather is cold enough to pack seven hundred hogs per day, until the completion of the contract. Payments were made by the defendant amounting to the sum of \$15,640.

Previous to the above modification of the contract, the defendant on the 2d of November, caused a notice to be delivered to the plaintiff as follows: "We want the three thousand hogs to be delivered to us on the 15th inst." On receiving this notice, the plaintiff informed the defendant that he would make his arrangements to furnish the hogs agreeable to contract—have them all killed in one day, and delivered the next.

The plaintiff offered to prove that a large number of hogs were purchased, and forfeitures incurred by him by reason of the defendant's failure to take the number specified in the contract. But the court refused to admit the evidence; that the contract of purchase by the plaintiff was not a matter to be proved. That the difference between the contract price

with the defendant and the value of the hogs at the place of delivery were the facts to be proved, to show the damages sustained by the plaintiff.

In their charge to the jury, the court said, it appears from the evidence, that the hogs delivered have been paid for under the contract. And the plaintiff claims damages for a violation of the contract in not receiving the whole number of three thousand, named in the contract. By the contract the hogs were to be delivered between the 15th of November and 1st of January ensuing, at the option of the defendant, he giving twelve days notice. This gave him the right to demand the delivery of the hogs in one day, and notice to this effect seems to have been given. But afterward, this notice was not insisted on, and the contract was so changed by the parties, as to require the delivery of seven hundred hogs per day, when the weather shall be cool enough.

Schooley was engaged to cut and pack the pork, and he purchased the hams. He states that seven hundred hogs were required to be killed the 11th November, on Thursday. Mitchell and Payne, who acted for McNaughton in his absence, say that no such order was given, but that it was agreed that the hogs in the pens should be killed on the 11th, and delivered on the 13th.

On the 12th November there was an order for seven hundred to be slaughtered on that day. But this order was waived by Irwin, the agent of the defendant. Irwin denies that he gave such an order, and declares that he had no authority to give it. It seems the defendant said to Payne and Mitchell, he was not, himself, a practical man, but that Irwin was, who would give instructions.

An order was given the 18th, Saturday, for seven hundred hogs. Six hundred and sixty-three were weighed. Schooley agreed to make up the deficiency. Some of the hogs were sent which were supposed to have been killed on that day. Another order was given on the 15th of November for seven

hundred to be delivered the 16th; six hundred and ninety-seven were weighed.

On the 16th an order was given for two hundred hogs, to be delivered on the 17th; two hundred were weighed and delivered, but the defendant's agents, acting under his orders, refused to receive any more. At this time there were several wagons at Schooley's pork house, loaded with hogs, which were refused. At the same time, it appears, there were in McNaughter & Mitchell's slaughter house eight hundred hogs cleaned. There remained eleven hundred and forty-two hogs to be delivered to complete the three thousand. To recover damages for the refusal to receive these hogs this action has been brought.

This is, no doubt, a hard contract on the defendant. Pork could be purchased at less than he agreed to give. But the court can not change the contract. The defense mainly rests upon the failures to deliver the hogs, under the notices given, as the plaintiff was bound to. This would have been a good defense for breaking up the contract and refusing to receive any more hogs if it had not been waived by the defendant. From time to time orders were given, notwithstanding the previous failure to deliver the number required. Such orders, given from time to time, must be considered as waivers of the previous default, as it declared a willingness to go on with the contract, and the plaintiff was bound to make the deliveries as required. He could not take advantage of his own failures. Under these circumstances, the court think the defense set up can not avail the defendant. He might have taken advantage of any failure by the plaintiff, and put an end to the contract, but he failed to do so.

The order for two hundred hogs to be delivered on the 17th of November was complied with, so that when the defendant refused to receive any more hogs under the contract, the plaintiff was not in default, as the previous failure had been waived by subsequent orders. At this time, Schooley refused,

Stewart et al. v. Hamilton.

as the agent of the defendant, to receive any more hogs, though it appears from the evidence, a large number were ready to be delivered, having been killed and cleaned. And the last order having been complied with, the plaintiff stands in the attitude of having performed his agreement as he had been required, and was ready to complete it if he had not been prevented by the refusal of the defendant. A tender of all the hogs was unnecessary, they being on hand, after the refusal of the defendant to receive any more.

If these facts are fully sustained by the evidence, it will be your duty to find for the plaintiff such damages as the law authorizes. The measure of the damages will be, the difference between the market value of the hogs at the time of the refusal to receive them, and the price which the defendant in his written contract agreed to pay.

The verdict was for the plaintiff. Judgment.

STEWART ET AL. v. HAMILTON.

The service of a summons, by a deputy marshal, the day after the new marshal has filed his bond and taken the oath, the process having before been in the hands of the deputy, is good.

But this does not apply to the service of an execution. "If the marshal die, is removed from office, or his commission expires," he has no power to sell if he has made a levy, but another execution must be issued to his successor.

Messrs. *Smith* and *Breakinridge* appeared as counsel.

OPINION OF THE COURT.

A MOTION is made to set aside the service of a writ issued and served under the following circumstances:

It appears that Ray, a deputy marshal of Pepper, the former marshal, on the 8th of April, 1849, received the writ of summons, and served it on the 14th of the same month. On

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the 13th of April, Meredith, the successor of Pepper, filed his bond and took the oath of office.

The 28th section of the judiciary act of 1789 provides, that "every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power notwithstanding, to execute all such precepts as may be in their hands respectively, at the time of such removal and expiration of office," etc.

From this provision, it would seem there can be no doubt as to the legality of the service in question. By the act of the 7th of May, 1800, sec. 3, it is provided, that "where a marshal shall take in execution any lands, tenements or hereditaments, and shall die or be removed from office or the term of his commission expire before sale, or other final disposition thereof, the like process shall issue to the succeeding marshal and the same proceedings be had as if said former marshal had not died, or been removed, or the term of his commission had not expired."

But the above provision refers to executions, and can not be extended, by construction, to meane process. The motion to set aside the service is overruled.

WM. E. HACKER v. STEVENS & BERRYHILL.

A garnishee summoned who owes a sum of money, for which his note was given to the absent or absconding debtor, creates a lien in his hands to the amount of the sum due, and the promisee can not afterward assign such note.

If an assignment of the note be made to an individual who had notice, it will not affect the rights of the attaching creditor.

This proceeding having been had in the State of Pennsylvania, will be regarded as a legal procedure, by the courts of the United States, sitting in any other State.

And the attachment being still pending, and also the proceeding against the garnishee, will be good ground for a plea in abatement, if an action be commenced against the promiser, in any other State.

From the time the garnishee was summoned, he is amenable to the process, and liable to pay the debt to the plaintiff in the attachment.

Wm. E. Hacker v. Stevens & Berryhill.

Mr. *Stevens* appeared for the plaintiff.
Messrs. *Smith* and *Yanders* for defendants.

OPINION OF THE COURT.

THIS suit is brought on defendants' note to Hacker, Brother & Co., for \$896 96, which note was assigned to the plaintiff by the payee, 18th of October, 1848, and was then unpaid.

The defendants pleaded that before the assignment was made and before suit on the note was brought, on 2d December, 1848, Charles Willing commenced an action in the District Court of Philadelphia against Alfred W. Hacker, Henry M. Hacker, et al., by issuing a summons which was duly served on defendants, and that on the 23d of December, 1848, the court ordered judgment to be entered for want of an affidavit of defense for \$2507 18, and costs. That an execution was issued which was returned *nulla bona*.

That on the 6th of March, 1849, an attachment *sur* judgment, in the county aforesaid, and that the defendants should be summoned as garnishees. Service was duly accepted by the attorney of the defendants. Sheriff attached Berryhill, one of defendants, by copy, etc., 8th March, 1849. In answer to interrogatories, Berryhill stated that when the attachment was served, defendants owed Hacker, Brother & Co. \$896 96, for which amount they gave the note now sued on. That they received no notice of the transfer of said note until that day, 3d April, 1849, they were informed of the fact by one of the partners of Hacker, Brother & Co. That they had no other property or rights of the said firm in their hands.

Jurisdiction of the Philadelphia court is averred, and that the suit is still pending, and that they are still defendants as garnishees. And they aver that the assignment of the note to the plaintiff was not made until service of process upon them as aforesaid, however the same may be indorsed on said

note, and that the said note is the same on which they are sued in this action.

The plaintiff demurs to the plea specially. 1. Because the plea is argumentative, and not an averment of facts. 2. The whole plea is a mere statement of evidence, to prove facts, and not simple, direct averment of facts. 3. And otherwise, the whole, taken as it stands, is insufficient in law to quash said writ and declaration.

The plaintiff joined in demurrer. On the part of the plaintiff it is contended that the state of Indiana has no laws authorizing any such proceedings. That the attachment is not in the name of the plaintiff in this action, nor was he a party to the proceeding. And it is argued that an attachment only becomes a suit pending on service upon the party defendant. That if nothing be found on which to lay the attachment, there can be no *lis pendens*. A suit pending, which abates a subsequent suit, must be between the same parties.

The facts might have been more succinctly averred in the plea, but we think it is not bad, as the facts are necessarily stated from which to draw the conclusion of law.

A service on the garnishee creates a lien upon the debt in his hands, which makes him responsible to the plaintiff in attachment. By no act of his, after such service, can he, by paying the note, or by assuming to pay it to another person, exonerate himself from this responsibility. If this note had been assigned before the attachment was laid, no lien could have been raised, as the right would not have been in the payee; but the averment of the plea is, that the attachment was served before the assignment, and that fact is admitted by the demurrer.

The plaintiff in this case appears to be one of the firm to whom the note was originally given, and the facts authorize the presumption that the assignment was made to defeat the attachment. If the assignee had been a stranger, the argu-

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ment of the plaintiff's counsel, that there was no notice of the attachment lien, when the note was assigned, would have been stronger. But even in such a case, we suppose that the lien would have been sustainable.

The fact is admitted by the pleadings that the note was transferred, after the garnishee was summoned. The pendency of the suit against him, is notice to the holder of the paper, and any subsequent attempt, by a transfer of the note, to avoid the garnishment, is a fraud upon the plaintiff in the attachment; and finding the note in the hands of one of the late firm, or one of the same name, can not, as the facts are now before us, defeat the proceeding against the garnishee.

It is immaterial whether there be a similar law in Indiana, under which this proceeding was had in Pennsylvania, or not. It is enough to know that it is the law of Pennsylvania. Upon the whole, the demurrer to the plea is overruled.

STEDMAN, MAYNARD & CO. v. HAMILTON & HAMILTON.

An affidavit that the defendant can show, by a certain witness, that the goods were damaged when bought, for which the note sued on was given, without alleging that the fact was unknown to the plaintiff, is not sufficient ground for the continuance of a cause.

OPINION OF THE COURT.

A MOTION is made for a continuance on an affidavit, that the note on which the action was given was for merchandize—a part of which, at the time of sale, was damaged, which fact the affiant, one of the defendants, believes he can prove, if the case is continued. That process was served only a few days before the time expired for service of process; that the clerks of plaintiffs, and Composette, clerk of defendants, reside in Ohio; and their attendance can not be procured at the present term.

This affidavit is insufficient. It does not show that the

unsoundness of the goods was unknown to the defendants. It does not show the extent of the defects in the goods. The writ was served thirty-five days before the commencement of the present term, and the material witness is in the employ of defendants, and, it is said, not more than thirty-five miles from his residence. These considerations are sufficient to deny the motion for a continuance, without going into the consideration whether the defense could be set up, if proved.

BELL v. NIMMON ET AL.

A notice to take depositions is not good if served on counsel who could not attend to the taking of the deposition without being absent at the commencement of the court.

During court a service on the counsel is not good, if objected to

Mr. Cooper for plaintiff.

Mr. Breckinridge for defendant.

OPINION OF THE COURT.

A motion is made by plaintiff's attorney to reject certain depositions taken by defendants. This motion is founded on an affidavit by plaintiff's attorney, which shows that notice was served on the 16th May, inst., at Fort Wayne, to take depositions 80 miles distant on the following Saturday. The notice was sufficient by the act of Congress of 1789, which requires a notice to be so given as to allow of a travel of twenty miles per day to the place of taking the deposition. But the plaintiff's counsel states, under oath, that if he had attended the taking of the deposition, he could not have reached the court at its commencement.

The deposition will be rejected. No counsel is obliged to receive a notice of taking a deposition while in attendance at court. And for the same reason a notice, which if atten-

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ded to would deprive the counsel of being present on the day the court commences, he is not obliged to receive the notice. A notice to take depositions, if it require the counsel to leave court, or if he attends, will necessarily prevent his reaching court at its commencement, ought not be held a legal notice.

WM. E. HACKER v. STEVENS & BERRYHILL.

An unnecessary plea will, on motion, be directed to be withdrawn, as improperly incumbering the record.

Mr. *Stevens* for plaintiff.

Mr. *Smith* for defendant.

OPINION OF THE COURT.

THIS action was brought on a promissory note given by defendants, to Hacker, Brother & Co., at Philadelphia.

The defendants first pleaded jointly that one of them was garnisheed by Berryhill, a creditor of Hacker & Brother, against whom judgment was obtained. The case of garnishee is still pending, and that was pleaded in abatement. Also a single plea of Stevens was filed, setting up the same defense. Motion by plaintiff to withdraw the single plea—and the court directed the plea to be withdrawn as unnecessarily incumbering the record.

DOE EX DEM. B. MATHUSON v. CRAWFORD.

The law of the contract must be regarded and enforced by all courts, wherever suit may be brought.

But this law, can not embrace the remedy.

The remedy belongs to the state where it is brought.

Messrs. *Smith* and *Yandeas* for plaintiffs.

Messrs. *Hurvy*, *Gregg* and *Hammond* for defendant.

OPINION OF THE COURT.

THIS case is submitted to the court, on the following facts: The judgment upon which the land in question was sold was for a note in Cincinnati, dated on the 5th day of September 1839, executed by the defendant to Caroline White, etc. The judgment was rendered in Indiana, 7th day of October, 1841, and was replevied by Amos S. Wells, on the 22d day June, 1842, *fi. fa.* issued and delivered to the sheriff, and on the 12th July, 1842, the land was valued under the provisions of the statute, at \$1200; on the 15th of August, 1842, the land was offered for sale and a return made, "no sale for want of bidders." On the 3d of July, 1844, the plaintiff's lessor purchased the land for \$161, without regard to the appraisement laws. He the lessor of the plaintiff then being the owner of the judgment by assignment. On the 28th day of December, 1846, the sheriff made a deed for the land. It is now worth \$800.

The question which arises from the above facts is, whether the sale made by the sheriff, of the land in question, without regard to the valuation laws, is void.

The statute of Indiana, approved 13 February, 1841, provides, that no lands shall be sold for less than one-half their value, and that to be determined by appraisers under oath. This land sold for \$160, less than half its appraised value, and less than half its real value as agreed. At the time the law required real estate to sell for its full value. Revised code of 1843, p 1044.

This case is supposed to have been decided by this court in the case of *Smith & Sample v. Atwood*, 3 McLean, 545. In that case a motion was made to set aside the return of the Marshal, and that he be directed to collect the money under the laws of Pennsylvania, on the ground that the note on which the judgment was entered was made in Pennsylvania. The court overruled the motion. That was the decision given in the case referred to.

Dec ex dem. B. Matheson v. Crawford.

The case now before us calls upon the court to decide whether the laws of Ohio, where this note was made, shall control the execution on a judgment rendered in Indiana. And it must be admitted that the doctrine laid down in the case of *McCracken v. Haywood*, 2 Howard, 606, sustains the position taken, that the laws of Ohio must govern. In that case the court says, "the obligation of the contract between the parties, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant, till the judgment was satisfied pursuant to the existing laws of Illinois. Those laws, (that is the laws of the remedy), giving those rights, were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations, in the very words of the law, relating to judgments and executions."

No one can mistake the principle here laid down. It incorporates the remedy into the contract, as constituting an essential part of it. This being the rule, in regard to the remedy, we are not to look to the laws in force at the time it is actually sought, but we must refer back to the date of the contract, and inquire what laws were then in force. The legislature may have repealed them, but the simple act of making the contract keeps them in force, as a remedy, in defiance of legislative power. This, looking to the remedy only, is a startling position; and if it have no other merit, is certainly novel. We know, practically, that some of our State legislatures make, almost annually, alterations in remedial laws. How these different modes would work, all remaining in force as laws of contracts, remains to be seen. It would, certainly, greatly increase the perplexities of all sheriffs and marshals, and others who are called upon to perform similar duties.

But the principle does not end here. The contract brings into any State where suit may be brought upon it, the remedy

which the law gave in the State where it was entered into. This is clearly within the decision. And this places the law of the remedy, not only above the legislative control of the State where the suit is brought, but the contract brings into the State new remedies, of other States, never having been recognized in the State where they are to be enforced. And in carrying out such a principle, it might happen, and no doubt would occur, that the means of giving effect to a foreign remedy, legalized by the contract, do not exist in the State. Will the foreign law, brought into a State by the contract, enable the court or the parties to institute the necessary agencies to give it effect?

The case in Illinois where the contract was made and enforced, gave some plausibility to the principles laid down in the decision; but it must be seen by every one who examines the subject, that the principle can not be carried out. It is impracticable, and can not be enforced in numerous cases. In the present case the laws of Ohio can not be recognized in Indiana, in giving a different remedy from the existing law here.

No difficulties arise in giving effect, in any State to what is properly called the law of the contract, in contradistinction to the law of the remedy. The above decision confounds the two which are distinct in their nature and obligation, and treats them as one. In this, in my judgment, the error of the decision consists.

In the case before us, the note was given to a firm in Cincinnati, and payment was to be made there. We look to Ohio for the rate of interest, and also if there were indorsements, to the demand of payment and protest, and notice required by the law of Ohio. But as the remedy has been sought in Indiana, the laws of Indiana must govern. Not the laws in force at the date of the contract, for it having been made in Ohio, by no possible construction, could have had any reference to the laws of Indiana. Those laws are

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invoked for the first time in bringing the suit, and the law in force, regulating execution at the time judgment was rendered, must govern the case.

SAMUEL CULBERTSON v. THE WABASH NAVIGATION COMPANY.

A company incorporated by a law of Indiana, and also a law of Illinois, to improve the navigation of the Wabash, which constitutes, to some extent, the boundary between the two States, the general place of meeting of the directors to do business being in Indiana, the records being kept there, suit may be brought by, or against the corporation in that State.

If a plea answer only a part of the count in the declaration, it is demurrable.

Messrs. *Smith* and *Marshall* for plaintiff.

Messrs. *Judah* and *Sullivan* for defendant.

OPINION OF THE COURT.

THIS action is brought on a contract to improve the navigation of the Wabash river, by various works specified, which were to be completed on the 1st of November, 1848, dated 24th of August, 1847. And it was provided that if at any time the party of the first part, shall refuse or neglect to push the work in a manner that will warrant its completion within the time specified, or to do the same in a workmanlike manner, and agreeably to said writing, the Engineer may, at his discretion, declare said writing forfeited, which declaration of forfeiture should exonerate the defendants from all obligations and liabilities arising from said writing; and that one-sixth per centage on the whole work then due shall be forfeited to the said defendants. And it was agreed that the decision of the Engineer should be final.

The right to change the contract was reserved in the company, and the plaintiff alleges, that the contract was so changed as greatly to increase the labor, expenditure and

materials, so that the work could not be completed within the time limited.

The defendant filed, 1. A plea to the jurisdiction of the court—that the defendant is not a corporation created by, and transacting its business within the State of Indiana, but was constituted by the States of Indiana and Illinois. By the act of 13th January, 1846, made dependent upon the consent of Illinois. That the consent of Illinois was given 30th January, 1847, whereby the above company was incorporated, and that the company was organized under both laws.

2. That of the six directors, two of them reside in Illinois and are citizens of that State.

3. That the business of the company, the erection of certain works on the Wabash river, the banks of which are within the peculiar jurisdiction of each of said States, and the other part is within the concurrent jurisdiction of the said States.

4. That the Directors have met as well in the State of Illinois as in the State of Indiana, for the transaction of their business, as its nature rendered it convenient. And that there is no particular place of business established for said company by the act or by the laws of the company.

5. That the stockholders are citizens of Indiana and Illinois.

6. That Culbertson, the plaintiff, is a stockholder. Replication that the President and Secretary reside in Indiana—Directors were there elected, and that Vincennes is the place of business, etc. Demurrer, etc.

The defendant filed a special demurrer to the declaration. And the plaintiff demurred to the sixth and seventh pleas, filed by the defendant.

The declaration avers the plaintiff to be a citizen of Pennsylvania, and complains of the "Wabash Navigation Company, a citizen of the State of Indiana," etc.

By the decision of the case in 2 How. 497, the right of a

corporation, to sue in the courts of the United States, as a citizen of the State in which its business is done, is recognized, without regard to the citizenship of its stockholders. Under the prior decisions, jurisdiction was taken from the citizenship of the stockholders, which created embarrassment and deprived many corporations from suing in the courts of the United States. To give them the rights of citizens of the State where their business is done, carries out, more perfectly, the intention of Congress, by enabling citizens of different States to sue in the Federal courts.

The question now before us is one that has not, it is believed, arisen in any of the federal courts. It is argued that as the corporation derives its function from both states to accomplish an important work, on a river, which is the boundary of both, at least, to a certain extent, that the courts of the United States can not take jurisdiction, as the place of business of the corporation is in both states, and not, exclusively, in either. Illinois having assented to the work, and conferred on the corporation the necessary powers, so far as its jurisdiction is concerned, there can be no doubt as to the powers of the corporation. And the question is, as to the locality of the place in which the business of the corporation is done.

Under the joint act of two states, the powers conferred to be exercised for the benefit of both, may be exercised in either. The act does not require the business to be done in either State, as regards the action of the directors; the work is to be done in both. But we are not now speaking of the manual labor required, whether it be on one side of the river or the other, but as to the power to make the contract, and to superintend the work. In this respect it would seem the claim of Indiana is paramount to that of Illinois. The act was first passed in Indiana, the company was organized in it, the president and secretary have constantly resided in Indiana, and a majority of the directors, and their principal business, at least, has been done at Vincennes, the residence of the

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president and secretary. And if, in one or more instances, the directors have met, in Illinois, to judge of a work to be constructed, it does not affect the general residence in Indiana. The books of the company are kept in Vincennes, in Indiana, which is the general place of meeting, and where the business of the directors is partially done. This, we think, is sufficient to make the defendant responsible to the jurisdiction of Indiana, and would enable the corporation to bring suit in that State. And we suppose that the corporation might also sue in Illinois. On the principle of comity a corporation may sue in a State, other than that which creates the corporation; and in this case there is more than comity. There is a legal sanction to the corporation by the laws of Illinois. We think, therefore, that the jurisdiction of this court may be sustained in this case.

The plaintiff is alleged to be a stockholder in the corporation, but this, we suppose, does not prevent him from suing the company under the contract. His interest in the company extends to the stock he has subscribed and the consequent rights of one of the corporators; but he is individualized in the contract, and whilst he would be held, under it, individually responsible, he must have a remedy against the corporation for any failure on its part.

A special demurrer is filed to the declaration. After stating the power by the defendant to alter the contract, the declaration avers, "that after the making and delivery of said writing obligatory the said defendant altered said specifications and greatly increased the amount of work to be done by said plaintiff under said contract, to wit: in the sum of five thousand dollars, and thereby so increased the amount of labor to be done and materials to be furnished by plaintiff and said Isaac, that they could not perform the same within the time specified therein."

The cause of demurrer assigned is a want of certainty in the excuse, for not performing the contract within the time

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limited. On a general demurrer we suppose the declaration might have been sustained, but it is not good on a demurrer where the causes are assigned. The specifications may be considered more a matter of form than substance. But it is proper that the defendant should have reasonable notice of the alterations in the contract by way of excuse, that the defendant may meet them by proof. In this respect, we think, the declaration is defective and that the demurrer must be sustained.

The sixth plea alleges that the defendant did not alter the contract so as to increase the amount of work to be done, so that the same could not be completed within the time limited.

This plea answers only a part of the second count in the declaration. The plaintiff alleges that he was prevented from going on with the work. To this important allegation no answer is given. The plea, therefore, that the alterations did not so increase the labor of the defendant so that the same could not be completed within the time limited, answers only a part of the allegation in the count, and the plea is, therefore, defective. The demurrer to it is sustained.

On the same ground the demurrer must be sustained to the seventh plea. That plea avers that the alterations mentioned in said second count did not require any extension of the time, but does not answer the other and important averment in the count, that the plaintiff was prevented from going on with the contract.

On application leave is given to plaintiff and defendant to amend their pleadings.

LESSEE OF BAIRD AND BARTMOSS v. BENJAMIN WOLFE.

A witness, at whose instance an ejectment is brought, and who is the assignee of a part of the consideration, for which the land was sold, and the suit being brought, on a failure to pay the consideration, is not a competent witness.

The statute of limitations does not run against an equitable title, nor in favor of one.

A presumption of a title may arise from long possession, and under such circumstances as are favorable to such a presumption.

But, it may be rebutted by circumstances or positive proof. In many cases the court will refer the presumption to the jury for their consideration and decision.

Messrs. *Smith* and *Sullivan* for plaintiffs.

Mr. *Judah* for defendant.

OPINION OF THE COURT.

PATENT for the land in controversy, was given in evidence, to James Baird or to his legal representatives, for four hundred acres, dated 21st September, 1847.

Peter Bartmoss and Eli Adams being sworn, proved the heirship of the lessors of the plaintiffs.

Mr. Ewing being offered as a witness, was objected to, on the ground of interest. It appears that he commenced the suit and procured Mr. Browning to become security for costs, and it was alleged, promised to indemnify him. Mr. Browning on being examined, said Ewing informed him, when he applied to him to indorse for costs, that the party was good, but did not specially promise to indemnify him. But the witness expected Ewing would not permit him to be injured.

It appeared that Ewing was the assignee of a small part of the consideration agreed to be paid for the land. The witness was admitted to give evidence, by the court, subject, at any future stage of the case to be overruled.

A deposition was offered which was taken under a rule of court, which authorized depositions to be taken under the laws of the State. Those laws specify certain cases in which depositions of witnesses may be taken, which do not require the reasons for taking them to be stated.

The plaintiff claims a right to take them because they live more than one hundred miles from the place of holding the court. The deposition can not be received as having been taken under the act of Congress, as the requisites of that act have not been complied with. Is the deposition admissible as having been taken under the laws of the State? The rule of court may be so construed, as to embrace merely the mode of taking depositions, where the right exists under the act of Congress. The deposition was admitted on parol proof that the witness lives more than one hundred miles from the place of holding the court.

The land in controversy was not acquired in the ordinary mode of entry and payment, in the Register's and Receiver's offices, under the act of Congress. On the 21st of April, 1806, an act was passed, authorizing the Registers and Receivers of public moneys of the district of Vincennes and Kaskaskias, under the direction of the Secretary of the Treasury, to lay out one or more tracts of land in their respective districts, for the purpose of locating therein, tracts of land granted by virtue of any legal French or British grants, or of any resolution, or act of Congress, etc. The claims of the character above stated, under various subsequent acts of Congress, and the action and reports of the land officers were examined, and confirmed by Congress, and certificates were issued which authorized the person to whom issued, to locate the tract within the time and place limited. This tract of four hundred acres was acquired in this mode. It was located by Baird, who sold the land to Duncan, and who, it is alleged, never paid the full amount of the consideration. Ewing was the assignee of the consideration to be paid, two hundred and fifty dollars with interest, and suit is commenced to recover the possession, by reason of the failure to pay the consideration in full.

The agreement for the sale of the land to Duncan, was proved, and that an imperfect deed was made out by Baird, which, together with the agreement, was placed in the hands

of Ewing in June, 1824. In 1825, the witness's house was burnt, and these papers were burnt with it. It seems two hundred and fifty dollars of the purchase money remained unpaid, and of which Ewing was the assignee. And Ewing states, that from year to year, from 1819, at the time of the sale, to 1824, Duncan promised payment.

One witness, who was one of Duncan's executors, and who examined his papers, never saw a receipt for the balance of the purchase money. He never saw a deed from Baird for the land. In 1835-6 believes Wolfe claimed the whole tract. He claimed the whole of it prior to the sheriff's sale. Wolfe took possession of the land in 1840 or 41. He purchased from Sloan, and one of the witnesses stated that he had seen a deed from him to Wolfe.

The above is the ground on which the plaintiffs rest to recover the possession of the land. The legal title being in them under the patent, and a part of the consideration money not being paid.

The defense, gentlemen of the jury, is, first, that the purchase money has been paid. A receipt is produced, which, it is alleged, was given for the balance of the purchase money. The genuineness of the receipt, and the circumstances under which it was procured, are for your determination. If you shall find that the consideration money has been fully paid, it will take away from the plaintiffs all equitable considerations, and leave them only the claim to the legal title.

On the part of the defendants, it is insisted, that the act of Congress confirming the right to this tract to the original claimant, under the report of the Register and Receiver, vested in the claimant the legal title. This was not the effect of the confirmation. It was the right to four hundred acres of land which was confirmed, and not any particular tract of land. The certificate which the claimant received, as evidence of his right, authorized the location of four hundred acres of land, but, until such location was made, the claim was without locality, except within the district designated,

for the satisfaction of such claims. A legislative act confirming a title, which was in its terms final, and required no further action of the government, would be considered a grant. But the right before us was not of this character.

The statute of limitations of twenty years is relied on, as a bar to the plaintiffs' recovery. To maintain this defense an adverse title must be shown. Since 1814, this claim appears to have been under Duncan, and there would seem to be no claim of an adverse character, unless it can be set up under the sheriff's deed. An equitable claim, however strong it may be, can not be set up at law to defeat the legal title. Nor can the statute of limitations be pleaded as a bar to a legal title, where the defendant has only an equity.

Until the emanation of the patent in 1847, the legal title to the land in dispute, it is contended, remained in the United States. The statute does not run against the government, nor against an individual who holds only an equitable title.

By the revised statute of 1843, page 455, an individual who holds a final certificate for lands purchased from the United States is vested with the legal title, so as to subject it to the lien of a judgment, and to execution, as where the patent has issued. But this law was not passed until after the above transaction. As the law then stood, the equitable title could not be sold on execution, and a sheriff's deed, it is supposed, on a sale of the equity merely, could not convey a title which could be set up under the statute. A title may be set up under the statute, which is fair upon its face, but inoperative, as it was adopted to protect a *bona fide* holder under such a title. But a sheriff's title must be considered as essentially connected with the judgment; and when the sheriff attempts to sell that which is not subject to execution, he can convey no title, and a void title is not one which the statute will protect. The purchaser, at most, in such a case, could take only the right held by the defendant in the judgment; and that right being only an equitable one, could not avail the defendant against the legal title.

Ewing is an interested witness, as the recovery is for his benefit; and it appears by a contract with Bartmoss he is responsible for the costs, and what he has said is withdrawn from the jury.

But waiving a reliance upon the statute of limitations, the counsel for the defendant relies on the presumption of a deed to Duncan.

This presumption is founded, 1. On a possession of thirty-five years. 2. No contract respecting the title was known for a long time. 3. That Duncan had the ability to pay the amount. 4. The receipt of the balance by Sullivan to be paid on the execution of the deed. 5. Acquiescence of the claimants in the sheriff's sale to defendant. 6. The loss of the recorder's office in Knox county, by fire. 7. The recital in the deed from Duncan to McCall. 8. The controversy between Duncan and Tuckers, in which Duncan said he had left his title at home.

The presumption of title arises from lapse of time and circumstances, which may, however, be rebutted. When an individual has been a long time in the possession of the property, and there are no facts proved which go to rebut such presumption, the court will leave the question to the jury whether a title may not be presumed. But in this case, although the possession has been in the defendant and those who preceded him in the claim of purchase many years, yet there are facts which conduce to show that the whole of the consideration money has not been paid; and the deed to Duncan was not to be executed until the whole of the purchase money should be paid. It is true there is an acknowledgment of the receipt of the consideration on the deed, but this is not conclusive and may be explained. Indeed in all conveyances the consideration is acknowledged.

The receipt to Sullivan, if genuine, shows an intention by Duncan to pay the balance, but it does not appear that Sullivan was acting as the agent of Baird, or that he had a right

Rockhill, Smith & Rockhill v. Hanna.

to receive the money. In receiving it he acted as the agent of Duncan, and unless it was paid over, to the proper persons, Duncan could not claim a credit for it. The money it seems, was to be paid when the deed was executed.

The deed that was made out by Sullivan for Baird was defective in not describing the boundaries of the tract, and it seems that this deed was never delivered. There is no controversy as to the whole of the consideration being paid, except the two hundred and fifty or fifty-four dollars. Now, this will explain why the possession of the land was taken and improvements made, by the acquiescence of those who obtained the patent. Until the patent was obtained, Baird could not make a deed that would be operative from its date. The patent, it seems, was not issued until 1847. A deed made before that time to Duncan, would have been made good by the patent, but the date of the patent is of some importance, as it may, in some degree account for the reason why a deed was not made to Duncan. And also the recognition or admission, at different periods by Duncan, that the above small balance was due.

Upon the whole the facts are left with the jury, whether from a deliberate consideration of them, the jury can presume a deed from the lessors of the plaintiffs, or from their ancestor. If there be any thing in the case to make the presumption doubtful, as to a deed having been executed to Duncan, it will not be presumed.

Jury found for plaintiff. Judgment.

ROCKHILL, SMITH & ROCKHILL v. HANNA.

Under the laws of Indiana on all judgments there is a lien on the lands of the defendant ten years.

Judgments entered on the same day, create equal liens, and the issuing of an execution on any one of them does not affect the lien on the others.

Rockhill, Smith & Rockhill v. Hanna.

The land of the defendant being sold, a *pro rata* distribution of the proceeds should be made in satisfaction of the judgments.

The diligence of a plaintiff can not give him an advantage over the others.

The judgment lien, in its effect, is similar to mortgage liens.

A sale on one mortgage, the other mortgagees not being made parties, can not affect their liens.

The sale will be considered as subject to the other mortgages, to the same extent they being equal liens, etc.

Messrs. *Morrison* and *Majors* for plaintiffs.

Messrs. *Smith* and *Newcomb* for defendant.

OPINION OF THE COURT.

THIS action is brought against the marshal and his securities, charging him with a false return on an execution, by which the plaintiffs have failed to receive the amount made on their execution, etc.

The defendant pleaded specially several pleas, that certain judgments were obtained at the same term, and that executions were issued, etc. And that the defendant Hanna was ready to pay and had offered to pay, a *pro rata* amount on the execution of the plaintiff. To these pleas the plaintiffs filed demurrers assigning the cause of demurrer.

The fourth breach assigned in the declaration is, "that the money made belonged to the plaintiffs, and that defendant Hanna refused to pay it to the plaintiffs, or return it, etc., as commanded."

The fifth breach is, "that the marshal's return is false and partial, in that it assumes that the sums awarded and apportioned by him, were due to the persons to whom he awarded them, when in fact much less was due on the executions adverse to the plaintiffs and much more was justly due to them."

These two breaches are not placed on the ground that the plaintiffs had priority by reason of their superior diligence, but as a matter of right appearing from calculation. The plea purports to go to the whole declaration, but does not

answer either of the above breaches. In this the plea is defective and the demurrer to it must be sustained.

The marshal was required by the writ to make the money, and have it at the return of the writ. If he undertake to pay over according to the rights of the plaintiffs in the several executions, he acts at his peril, and he is liable should he make any other than a legal application of the money in his hands.

The facts out of which the principal questions arise are, 1. That the plaintiffs obtained a judgment on the 19th of Nov., 1838, against John Allen for \$957 24. A second judgment was entered in favor of Newlin and Marshal against Allen, on the same day, for \$1093 52; and a third judgment in favor of Lester, Price and Cook, against Allen, was entered on the same day, for \$3056 71.

Fletcher and Butler were attorneys in the last two named cases. On the 7th of February, 1839, was issued a *capias ad satis faciendum*, on the first named judgment, which was served and a prison bound bond was taken by the marshal, 22d March, 1839. The defendant remained in custody until the Act of Indiana of 1842, providing for the enlargement and discharge of debtors, which being adopted by Congress, in a general enactment, that in regard to imprisonment for debt, the State law should be followed by the courts of the United States, the defendant was discharged from his imprisonment.

On the last two judgments, executions, 17th December, 1838, were issued, which were returned *nulla bona*. And on the 5th March, 1839, an alias writ of *scire facias* on each of the last two judgments, was issued, which were levied upon several tracts of land. Before the judgments were entered Allen sold the land and conveyed it in fee simple to one Coats, who gave two promissory notes for \$2,000, one payable 13th of August, 1841, the other the 13th of August, 1842, and also executed a deed of mortgage on the land.

The mortgage was assigned to Fletcher and Butler as security for the payment of the two judgments, and another claim of one thousand dollars.

Butler and Fletcher agreed to stay proceedings on the executions, until the 16th of May, 1844; when writs of *vend. exponas* were issued to be executed with the consent of the defendant Allen, dated the day of sale.

On the 30th of March, 1844, a writ of *feri facias* was issued on the judgment in favor of Rockhill, Smith & Rockhill, and the marshal, on the 12th of April, 1844, levied it on the land, which had before been levied on by similar writs on the other judgments, the 5th of March, 1839.

The land was struck off on the sheriff's sale to Fletcher and Butler, for \$1360, as described by the said writ of *fi. fa.* the *venditioni exponas* being in the hands of the marshal, Fletcher and Butler had no knowledge of the execution issued on the Rockhill judgment until the 16th of May, 1844.

On application to the court, founded upon affidavit, the above sale was set aside, and executions being issued on all the judgments, the marshal returned that he had sold the land on all the executions. The court directed a *pro rata* distribution of the proceeds of the sale on all the judgments.

And the question is made from the pleadings in this action, whether the Rockhill, Smith and Rockhill judgment is entitled to a preference over the other two judgments, in the application of the proceeds of the sale. The plaintiffs' counsel contends that it is, by reason of the levy made on the land on the 12th of April, 1844, under an execution on the Rockhill judgment. The previous levy on the same land, made the 5th of March, 1839, under the other judgments, he contends had become inoperative by not having been prosecuted for some five years.

The plaintiff's counsel claims that by his superior diligence, he is entitled to the full satisfaction of his judgment to the exclusion of the other two. And he relies confidently on two

decisions in New York, and one by the Supreme Court of Indiana, which adopted the New York decisions. In the case of *Adams v. Dyer*, 8 John. Rep. 347, the court held, where judgments in favor of different plaintiffs against the same defendants, are filed and docketed on the same day, the plaintiff who first issues a *fi. fa.* the execution of which is commenced by the sheriff's advertising the defendant's lands for sale, gains a preference, as to the lands, which can not be defeated by a subsequent execution issued by another plaintiff. And afterwards in the case of *Waterman v. Haskins*, 11 John. Rep. 228, it was decided, that where judgments in favor of A and B respectively, against C were filed and docketed the same day, and A issued a *fi. fa.* to the sheriff of New York, and B afterwards assued a *testatum fi. fa.* to the sheriff of W, under which the sheriff levied on the lands of C, and advertised the same for sale, and a few days afterwards, issued a *testatum fi. fa.* to the sheriff of W; held that the sheriff of W was first to apply the money levied by him to the satisfaction of B's execution.

And in the case of *Michart v. John O. Boyd et al*, decided November term, 1848, the Supreme Court of Indiana held, that land acquired by the defendant subsequent to two judgments entered against him, that the lien equally attached on both, although one of the judgments was prior in date to the other. And they say, "the next question is, whether the circumstance that Starr and Smith's execution was issued and levied on the land before the issuing of the plaintiff's execution, makes any difference. This point they say is settled by authority, and they refer to the cases in Johnson above cited, and to a case in 1 Howard's Miss. Rep. 39. In the present case, they say, "Starr and Smith's execution being the first issued and levied, gives them the priority, as the most vigilant creditors," etc.

These authorities are entitled to the highest respect and generally we should follow them as safe guides, but in the

present case we can not do so, unless the decision in Indiana shall be considered as giving a construction to a statute of the State, in which case our rule of decision requires a conformity to it.

We suppose it is clear, that the decision does not depend upon the construction of a statute. There is no provision in the statutes of Indiana which touches this question or can have any bearing in its decision. And this point is left with the remark, that it must rest upon general principles, as to diligence, there being no provision on the subject, in regard to executions where the judgment liens are equal.

By the statute of Indiana, a judgment creates a lien on the real estate of the defendant, from the time of its rendition to the expiration of ten years. This provision is unequivocal, and is as binding as a mortgage. In *Rankin v. Scott*, 12 Wheat. 507, the court said, "it is a universal principle, that a prior lien is entitled to prior satisfaction out of the thing it binds, unless the lien be intrinsically defective, or is displaced by some act of the party holding it, which shall postpone him at law or in equity. Mere delay in proceeding to execution is not such an act."

In the case under consideration, the liens are equal. The judgments were rendered on the same day. And it is contended by the counsel that the most diligent plaintiff obtains a preference over the other two. He admits that this diligence can not affect the lien of a prior judgment. If it can not affect a prior judgment, how can it affect a lien of equal date? The lien does not depend upon a race of diligence on the executions. It stands good, under the statute, for ten years. It is not liable to be misplaced by the greater diligence of the plaintiffs in the other cases. The statute makes no provision on the subject, the lien is complete, the judgment being kept alive for ten years.

Suppose three mortgages had been given on the same land and on the same day, to the plaintiffs of the three judgments. Could either of the three mortgagors, by filing a bill or other-

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by legislative provision; and the plaintiffs in each judgment having equal right to claim satisfaction out of the land sold, in proportion to the demands of each, and the proceeds, no other application of the proceeds can be legally made.

But in what consists the superior diligence of the plaintiffs in the Rockhill judgment?

The plaintiffs in the other cases caused a levy to be made on the land the 5th March, 1839. At that time Allen, the defendant, was in prison bounds, under the *cas sa* issued on the Rockhill judgment, and remained in prison for several years. After his discharge, and not until the 30th of March, 1844, was an execution levied under the Rockhill judgment. The land was advertised, and on the day of sale the marshal had in his hands two writs of *vend. exponas*, commanding him to sell the land on the other two judgments. The sale was set aside by the court, and executions were issued on all the judgments, and the sale was made on all. Under these circumstances, the court directed a *pro rata* application of the proceeds of the sale on all the judgments.

Now, if the decision were to turn on the question of diligence, how should the money be applied? The levy on the land under the two judgments, being five years before the Rockhill levy, it is contended that the first levy was made void by a want of diligence. There is no provision of the statute, that a levy shall be prosecuted with diligence, nor is there any such principle of law. If a levy be made, merely to cover the property, it is fraudulent, and on that ground it may be set aside. But, we are speaking of a *bona fide* procedure. The levy on real estate may be permitted to lie to the extent of the lien of the judgment, unless other levies shall be made under junior judgments, or judgments rendered on the same day, having equal liens. And, in such a case the land being sold must be distributed as the prior or equal liens of the judgments shall require. An equal lien is not

less strong for a *pro rata* amount of the proceeds, than a prior judgment is for satisfaction.

The superior diligence would seem to be, not on the part of the Rockhill plaintiffs, but by the plaintiffs in the other judgments. But this is not a question of diligence, but as to the effect of equal judgment liens, under the circumstances; and we hold, that the liens being equal, the proceeds of the land sold must be paid on the executions *pro rata*, without regard to the means by which the sale was effected.

As the above decision did not determine the action for a false return, at a subsequent term, the above points were again argued, and the court intimated that their views remained unchanged, and at the earnest request of the counsel for the plaintiffs the points were certified to the Supreme Court.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—JUNE TERM, 1849.

JOHN STEWART v. MORGAN S. DRASHA ET AL

A note being sent to the defendants to sign, for a debt acknowledged to be due, the defendants substituted a note for the same amount, dated on Sunday.

A bill of discovery was filed, in which the defendants were called to answer, as to the above fact.

The defendants demurred, as the answer required would subject them to a penalty for a breach of the Sabbath.

The court sustained the demurrer.

Also, they sustained a demurrer to that part of the bill, requiring the defendant Drasha, to answer whether he was not a lawyer, and did not write the note.

Mr. Joy for the complainant.

Mr. Howard for defendant.

OPINION OF THE COURT.

THIS is a bill of discovery to aid in a suit at law. The defendants being indebted to the plaintiff in \$600, neglected to pay. Demand and protest being made, notice was given by letter that the note must be paid or suit would be commenced. Some correspondence took place, and defendants agreed to give a new note, including costs of protest, etc., payable in sixty days. Such a note was drawn and handed to one of the defendants to be taken to Pontiac, where they resided, to be executed. But, instead of signing the note given to them, they substituted another of the same amount,

dated the 21st of March, 1847, the note sent being dated the 16th of March. The note substituted was dated on Sunday, and suit being brought the defense set up is, that the note being dated on Sunday, is illegal and can not be enforced.

A bill was filed in which the complainant called upon the defendants to answer the above facts. The defendants demur, on the ground, that by answering they would subject themselves to a penalty for a breach of the Sabbath.

The court sustained the objection as to the 8th interrogatory, "whether the said note was actually signed by all of the said defendants on the day it bears date, and if not, then which of the said defendants did not sign the same on that day."

As the statute inflicts a penalty for a breach of the Sabbath, which, we suppose, consists in doing an act on that day not lawful to be done, we are bound to sustain the demurrer. At the same time we can not forbear to say that the objection, under the circumstances, comes with a bad grace from the defendants. It would seem such an objection, where the act of giving the note was the act of the defendants, and against the request of the complainant, authorizes the presumption that the note was dated on the Sabbath, with the view to the objection now made.

The court also sustained the demurrer to the 10th interrogatory, "whether the said Morgan S. Drasha is not a lawyer by profession, and whether the said note so substituted was not written by him, or by some one in his presence and by his direction."

The other interrogatories the court required the defendants to answer.

ROBERTS & ROBERTS v. WARD & WARD.

To entitle a person to a patent, his invention or improvement must be new.

It must also be useful.

These points being submitted to a jury, they found against the plaintiff.

Messrs. *G. C. Bates* and *J. M. Howard* for complainants.

Messrs. *Joy* and *Porter* for defendants.

OPINION OF THE COURT.

THIS bill charges the defendants with the violation of a patent right. The complainants claim under Isaac Babbitt, the inventor, in virtue of legal assignments made and recorded in the patent office, the right within the State of Michigan.

The patentee claimed to have invented a new and improved mode of making or constructing the boxes, within which the gudgeons or journals of machinery in general and the axles of railroad cars, etc., are to run, by which mode of constructing or making such boxes or bearings, the heating and abrasions, which are apt to occur in the ordinary mode of constructing them, and their durability is consequently increased, and the following is the full description thereof:

"I prepare boxes which are to be received into housings or plumber's blocks, in the ordinary mode of forming such boxes, making them of any kind of metal, or metallic compound, which has sufficient strength and which is capable of being tinned. The inner side of these boxes are to be lined, etc.

To prepare the boxes for the reception of the composition, I cast them with projecting rims, etc. In finishing one of these boxes I cast the inside, including the rim, with tin, in the well known manner of performing the operation. The composition being melted is poured in through a hole left for the purpose. When the ledges are not used the coating of the composition metal should be thin."

And in the summing up he says, "what I claim as my

invention is, the making of the boxes for axles and gudgeons, in the manner set forth, by the casting of hard pewter or composition metal, of which tin is the basis, into the said boxes, they being first prepared and provided with rims or ledges and coated with tin, as hereinbefore described."

The above includes an improvement upon the original invention, for which a patent has also been obtained.

An issue was made up and sent to the jury to try, whether the invention was new and useful.

To entitle an individual to a patent, his invention must be new and useful.

In ascertaining its usefulness, it is not important that it should be more valuable than other modes of accomplishing the same result; but it must be a practicable method of doing the thing designed, in which its utility will more or less consist.

The invention must be new. In the present case the improvement of the present box used for wheels so as to retain the composition metal, and the metal thus composed and applied as stated, constitute the invention. Now if any other individual used a similar box and compound, before the invention claimed by Babbitt, he can have no exclusive right. If a box was constructed upon the same principle, though not exactly in the same manner, it will defeat that part of the plaintiff's claim. The word principle, as applied to mechanics, is where two machines or things are made to operate, substantially in the same way, so as to produce a similar result, they are considered the same in principle. As where any of the mechanical powers, the lever, the screw, the wheel, etc., are used to accomplish certain purposes, the same powers being used in a somewhat different form, to do the same thing, will not be a difference in principle. Whether the mechanical instruments be larger or smaller, whether their action be horizontal or vertical, the principle is the same.

The patentee claims a combination of the box as stated, and the composition as applied. From his own statement he has improved the box, and put in it the metal. He does not, it seems, claim that the component parts of the metal are new or that the combination of them is so. The thing claimed is, the use of a softer material inserted in the box so as to prevent its heating or abrasion, by the action of the wheel. In this view, the introduction of this material is the principle of this improvement, and not the particular elements of which it is composed; and if it shall appear to the jury from the evidence, that a material similar in its effect had been publicly used in the box before the invention claimed by the patentee, his patent, in this particular, is void for want of novelty.

Evidence was given to the jury conducing to prove a want of novelty to the jury. And the case was submitted to them on principles as above stated. The jury found for the defendants. A motion for a new trial was made, which the court overruled.

UNITED STATES v. JOHN R. WILLIAMS.

Congress having acted upon a claim for damages, done to the farm of the defendant, from its occupancy by the troops of the United States, no further allowance can be made.

Some proceedings were made, under a former law, for damages, and it seems the commissioners appointed to examine the premises estimated the damages much higher than was allowed by the late act, but no allowance was made under such procedure, and they can not now be considered.

No laches are imputable to the government.

No presumption of payment, from the lapse of time can be raised against it.

Mr. Norvell, District Attorney, for plaintiff.

Mr. Bachus for defendant.

OPINION OF THE COURT.

THIS is a bill to foreclose a mortgage. On the 27th of

June, 1812, the defendant executed four several bonds, each for \$800, payable annually, with interest.

To secure the payment of these bonds a mortgage was executed on 267 23-100 acres, on the purchase of which from the United States, the above bonds were given as the consideration.

This bill was filed on the 7th of February, 1844.

At the June term of this court, 1845, the cause was continued to give him an opportunity to obtain the action of Congress on defendant's claim for damages committed by the United States troops, on the premises in 1812. On the 8th of August, 1846, an act was passed directing the Secretary of the Treasury to credit the defendant in this cause as on the 15th of January, 1814, on his bonds and mortgage for \$3200, with interest till paid, that being the amount of the purchase money of a farm, etc., two thousand dollars, for damages done to his farm by the troops of the United States occupying it.

The defendant in his answer admits the purchase, the bonds and mortgage, and the occupancy of the farm by the troops of the United States, by which he avers the farm was ruined, by the destruction of the improvements on it, which constituted its chief value.

Under the act of 9th of April, 1816, which provided for the appointment of commissioners to take testimony in cases like the above, by the commissioner of claims at Washington, and the judgment of such commissioner in behalf of a claimant, was a sufficient authority for the payment of the money by the treasury.

In 1818 an act was passed transferring the papers of the commissioner of claims to the third auditor's office.

And the defendant claims that damages to the amount of \$4000 were done to the premises by the troops, and that the damages were so estimated by commissioners of the United States in the fall of 1817. Which claim was presented to

the treasury in 1831 and rejected. And he claims the same now as a set off.

It is a sufficient answer to this claim to say, that whatever steps may have been taken under the act of 1816, that no sum was awarded by the United States to the defendant under that act. And the late application to Congress and the passage of the act allowing the defendant two thousand dollars, to be deducted as in 1814, is conclusive of the defendant's claim for damages. Congress having all the facts before it, acted upon the subject, and no allowance can be made beyond that, by the judiciary.

The defendant, in his answer, relies upon payment from the lapse of time. But there is nothing in the case to render such a fact probable. All the circumstances go to show that payment has not been made. If, therefore, the case stood between two individuals, and the presumption of payment from the lapse of time might be made, we suppose that no such presumption can be raised against the government. Laches can not be charged to it, under the statute or in any other form.

It is alleged by the defendant that the bonds were usurious. But it is clear there was no usury in the case. The interest was calculated, or to be calculated, and paid from the time of the purchase, such being the contract. The bonds and mortgage were not executed until several months after the contract, and it was proper and legal that the interest should be paid from the time of the purchase.

Upon the whole, the court will refer the account to a master to state the amount due, and decree a foreclosure, etc.

BENEDICT ET AL. v. MAYNARD ET AL.

Where notes and mortgages are received in payment of a debt, and the creditors object to the arrangement, on the ground that the agent was not authorized so to

Benedict et al v. Maynard et al.

receive them; a proposal was made by the debtors to return the notes and mortgages, which the creditors refused to do, and brought suit on the mortgage, etc.; the court instructed the jury, that by refusing to return the instruments and bringing suit, they sanctioned the acts of their agent.

Mr. Lockwood for plaintiff.

Messrs. Hawkins and Emmons for defendant.

OPINION OF THE COURT.

THIS action is brought upon a note of hand. In 1841 defendants did business as merchants, under the firm of Wm. S. Maynard & Co.; and the plaintiffs were engaged in business under the name of Lewis, Benedict & Co. The note was given by the defendants for \$2,103 10, payable one day after date, for value received. Certain credits were indorsed on the note, and it was cut through in the usual mode of cancelling a note by the banks. The note was offered in evidence, but objected to until its appearance should be explained.

Mr. Kingsly, a witness, stated that the note was placed in his hands for collection, and he was instructed by plaintiffs to take mortgages or notes due, or soon to become due, to secure the payment of the above note, and that on such condition a reasonable time would be given. He received certain notes on good men, and a mortgage—one of the notes the defendants promised to pay, if the promiser did not. The mortgage was not assigned until sometime in February, 1843. He did not give up the note until sometime afterward. At the same time witness said to the defendants, if in making the arrangement, it should not be satisfactory, they must make it so. The defendants proposed to give the larger of two mortgages for \$1,800, the other for \$1,600. The farm covered by the smaller mortgage was more valuable than the farm covered by the larger mortgage. But witness understood, when he took the mortgage, it covered the more valuable farm. The assignment of the mortgage was abso-

lute, at Benedict's risk and costs. Defendants said that the mortgage was to be received in payment; witness replied, that he had no authority to receive it as such. Took the mortgage, and witness observed, if it was not right, defendants must make it so. When the mortgage was received, the balance of the note was paid to the plaintiffs.

After the arrangement was made, the defendants proposed to the plaintiffs, if they were dissatisfied with what their attorney had done, they were requested to return the papers, and place the parties as they were. But they never offered to return the evidences of claim.

The court instructed the jury that the inquiry for them was, whether the note had been paid. The mortgage for \$1800 was assigned, and the balance was received or paid by notes. It is not clear that Kingsley, the agent of the plaintiff, was authorized to receive the mortgage and the notes, in discharge of the note on which suit is brought. There seems to have been no unequivocal understanding, that the instruments assigned should be received in payment. But, when one of the plaintiffs, afterward, had a conversation with one of the Maynards, in which he said, if you are dissatisfied with your attorney, give me back the papers, and we will stand as we were. The papers, it seems, were not returned, nor offered to be returned. It appears after this, that suit was brought on the mortgage bond.

This act confirmed the contract made with Kingsley. For it was the duty of the plaintiffs to return the papers as proposed by the defendants, if they did not assent to the terms on which they were received by their agent. The defendants insisted that they were given in discharge of the note now sued on. After this conversation, by bringing suit on the mortgage and using the notes, the plaintiffs subjected themselves to the conditions under which they were transferred to the plaintiffs. And the facts being before you, gentlemen of the jury, it will be for you to determine whether the mortgage

Baker v. Root.

and notes were received in payment or not. If they were so received, you will find for the defendants.

Verdict for defendants.

BAKER v. ROOT.

A person having occupied a certain tenement under a written lease, at a certain rent, remained in possession sometime after the expiration of the lease—held, that he was bound to pay the same rent, as under the written lease.

Where property is received in trust, and the trustee sells it and receives the consideration and appropriates it, he is liable, the same as an agent, should the sale not be objected to.

Mr. *Seaman* for plaintiff.

Mr. *Howard* for defendant.

OPINION OF THE COURT.

THIS is an action of assumpsit. In consideration of two thousand dollars received by the defendant, he agreed to save the plaintiff harmless from all liability, as one of the firm of Root & Co. Also, to pay rent for his house and lot in Cold Water, one hundred dollars a year for two years, commencing 1st May, 1840; also to take proper care to remove the said Baker's store house, etc., to fit it up, said Baker paying for removing and fitting up, and rent of store \$75 a year. And Root guarantied the payment by Hanchett of a note for \$253, if suit should be brought upon it by 1st April, 1840.

Root stated to one of the witnesses that Hanchett, the partner of Baker, proposed that he should take a lot in the village of Cold Water, with the house thereon, to apply on the judgment against Baker & Hanchett, and also upon a demand in favor of Root against Hanchett for \$150. This was agreed to, and the lot was conveyed to Root.

Root was to discharge Hanchett from his own debt, and

discharge the judgment against Baker, or indemnify him against it. Root held the property until he sold it to Cooley, for barrels which were used by Root in his business.

The court charged the jury, that the plaintiff claimed a right of recovery on two grounds. 1. For rent for the house, \$100 per annum, and for the store \$75 per annum. The store was removed by Root, for which he had been credited \$75.

The premises were occupied some years after the written lease expired. And it is contended that the plaintiff can only recover for these years what the premises were worth. But, the court instructed the jury, that the defendant having occupied the premises under a written lease for a fixed price, and remaining on them after the expiration of the lease, without any other agreement, the same rent must be paid. And that interest from the time rent was due may be given by the jury.

That the action was not on the guaranty, which is only referred to to show the nature of the transaction.

The plaintiff claims, as the second ground of recovery, the amount of the judgment on the note, which defendant agreed to pay on the purchase of the house and lot in Cold Water.

The plaintiff also claimed the right to recover this amount against the defendant, if the house and lot were received by Root on trust, as he sold it for barrels which he afterward sold for cash, and this it is contended makes him responsible on a general count for money had and received. And also, on the common count, if the jury should find that Root received the house and lot and promised to pay the judgment. And the court so instructed the jury.

The jury found for the plaintiff. Judgment.

IRA P. EVANS v. IRA DAVENPORT.

The common law order of pleading is observed in this court.

A plea to the jurisdiction must be first pleaded.

The citizenship alleged in the declaration need not be proved unless specially denied by plea.

A person may reside in one State, and be a citizen in another.

An averment in a plea of residence is not sufficient

Messrs. *Wilcox* and *Gray* for plaintiff.

Messrs. *Barstow* and *Lockwood* for defendant.

OPINION OF THE COURT.

THIS is a declaration in ejectment, under the forms provided by a statute of the State. The defendant first pleads the general issue. 2d. To the jurisdiction of the court, alledging the defendant to be a resident of New York, instead of Michigan. And the plaintiff demurs for irregularity in the order of pleading.

The declaration alleges the plaintiff to be a citizen of New York, and the defendant to be a citizen of the State of Michigan.

It is contended that the facts stated in the plea are conclusive against the jurisdiction of the court. The plea denies a material averment in the declaration, which can only be traversed by a special plea. And it can make no difference that another plea taking issue generally, is on record first. The pleas are filed simultaneous, both are good, it is contended, as pleas in bar. And it is further urged, that a want of jurisdiction in a court of special and limited jurisdiction, may be shown at any stage of the cause. A plea in abatement should give the plaintiff a better writ. But in this case if the facts be true as stated, they show that this court can exercise no jurisdiction in the case.

This court follows the rules of the common law which requires that the jurisdiction of the court shall first be pleaded.

And it is well established 1 Chitt. Pleadings, 440, to file any other plea is a waiver of the want of jurisdiction of the court. From the face of the declaration it appears that there is jurisdiction on the ground of the parties being citizens of different States, the plaintiff being stated to be a citizen of New York, and the defendant a citizen of Michigan.

It was laid down by Mr. Justice Washington, in his reports, that a want of jurisdiction may be taken advantage of at any time in the progress of the cause; and it was held at one time that as the averment of citizenship, in the declaration, was a material one, it was denied by the general issue, and the plaintiff was bound to prove it on the trial. But these decisions have long since been overruled, and the settled practice now is, to require a plea to the jurisdiction where there is no want of jurisdiction apparent upon the face of the declaration. Where this averment of citizenship is omitted in the declaration, advantage may be taken of it in a motion to arrest the judgment or by a writ of error.

The circuit courts of the United States, though exercising a limited jurisdiction, yet are not inferior courts, which must show in their proceedings jurisdiction, or their judgments will be nullities. This is not the case with the judgments of the circuit court although the citizenship does not appear in the proceedings. Their judgments are valid until reversed.

The order of pleading by the common law, is founded in good sense and practical convenience. If the plea to the jurisdiction be sustained, there is an end to the cause on the state of the pleadings; and this necessarily arrests the further progress of the case. And this plea should always be the first pleaded, for this and other considerations.

But there is an objection to this plea which has not been noted in the argument. It avers that the defendant is a resident of New York. Now the plea may be true and yet the court have jurisdiction of the case. A citizen of Michigan may reside in New York, for any length of time and still

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maintain his citizenship in Michigan. A change of citizenship from one state to another is shown by the acts of the party. If he refrains from exercising the rights of a citizen in the state where he resides, and claims to be a citizen of the state he left, he does not lose his citizenship in such state. We suppose that the attention of the pleader was not particularly drawn to the difference between a citizen and resident. Leave will be given to the defendant to amend his plea, both as to the order of pleading and the averment of the plea.

BAERNS AND PHARO v. C. M. OMALLY ET AL.

A bill filed which the complainant can not sustain will be dismissed, at his costs. No grounds of equity, real or supposed, at the filing of the bill can authorize the court to tax the costs against the defendant.

Messrs. *Barstow* and *Lockwood*, for complainants.

Mr. *Abbott*, for defendants.

OPINION OF THE COURT.

THIS was a creditors' bill alleging fraud against the defendant, in covering, by assignment, the property of C. M. Omalley, against whom a judgment was obtained and execution returned, *nulla bona*.

The answer denies the material allegations of the bill; and the plaintiff declines a further prosecution of the suit, and is willing that the bill shall be dismissed; but he insists that under the circumstances, the bill should be dismissed at the costs of the defendant. That there was reasonable ground for the creditor's bill.

The court held that this could not be distinguished from an ordinary bill, where the plaintiff could not sustain it; and that it must be dismissed at plaintiffs' costs.

JETHRO WOOD'S ADM'R v. AMOS AND DANIEL GOLD.

Letters of administration can only authorize the individual to administer on the estate of the deceased, within the State in which they were granted.

Suit can not be brought in any other State, without the sanction of said State.

Messrs. *Baker* and *Willard* for plaintiffs.

Mr. *Gould* for defendants.

OPINION OF THE COURT.

A MOTION is made for a non-suit, on the ground that suit is brought under letters of administration granted in the State of New York. Letters of administration do not authorize a suit to be brought by the administrator in any other State. Except by sanction of other States, they can only operate within the jurisdiction under which they were issued.

The statute of Michigan requires letters to be taken out in this State, to exercise the duties of administrator here, or to bring suit.

BERGER v. WILLIAMS.

A judgment against the principal is *prima facie* evidence against the surety.

The surety may show fraud and collusion, that the debt has been paid or that there was a clerical mistake in entering the judgment.

A breach alleged in the terms of the bond is sufficient.

Mr. *Fraser* for plaintiff.

Mr. *Douglass* for defendant.

OPINION OF THE COURT.

BERGER and one Stevens being in partnership, Stevens purchased the stock on hand and gave bond, with Williams security, in the penalty of twenty thousand dollars, "conditioned to discharge and pay all the debts and engagements

of every kind due by the said firm, and to which it might be liable, be the same of whatever nature."

Judgment for the penalty was recovered on this bond, and a *sci. fa.* in the name of the plaintiff alleges a breach, etc., and to recover a debt recovered by Chauncey Moss, against the late firm, in the State of New York.

The defendant demurs to the sufficiency of the breach, on the ground that setting forth the judgment is not sufficient. That the consideration or cause of action, on which the judgment was rendered should have been averred.

A suit between the same parties on the same judgment, by a prior *sci. fa.*, for the benefit of a creditor, was before this court at the June term, 1846, page 125 of this volume. The present *sci. fa.* has been issued at the instance of a different creditor and involves questions not before the court in the former suit.

Is the judgment rendered against the late firm, in the State of New York, evidence in the case? We think it is, though it may not be conclusive evidence. The defendant is not a stranger to the judgment, though he is not a party to it. He has covenanted to pay this debt jointly with Stevens, if it were a genuine debt, for which the late firm of Berger & Stevens were liable. The judgment establishes this liability, unless fraud be shown. And this the surety may show. And further he may show a mistake in the amount of the judgment. The evidence of indebtedment is merged in the judgment.

In 12 Wheat. 515, it was held, that a judgment was *prima facie*, though not conclusive evidence against a guarantor. He may show a clerical mistake in the calculation of the judgment, or that it was obtained through collusion and fraud. Whether the judgment is final or conclusive is the only question in the case.

Lord Hardwicke, in *Querside v. Benson*, 2 Atk. 252, held, that such a judgment is conclusive against the surety. The

same doctrine was held 1 Ohio Rep. 446; *Heard v. Giles, et al.*, 20 Pick. 53; 10 Born. & Cres. 317. An entry in a book against the interest of a party, is evidence against a third person.

The case of *Moss v. McCullough*, 5 Hill 132, is relied on by the defendant, as showing that such judgment is not evidence, etc. In that case the Superior Court held a judgment against the principal was conclusive against the surety. And that was a point before the court. A new trial was granted. But that decision is in conflict, it would seem, with the case of *Slee v. Bloom*, 20 John. 669. The reasoning of Judge Cowen beyond the case can not be considered as authority, any more than his notes on Phillips' Evidence. In *Douglass v. Howland*, 24 Wend. 58. Cowen founds the decision on the authority of the two cases of *Beall v. Beck*, 3 Har. and McHenry, 242; and *Keller v. Powell*, 4 Hawks. 34.

The first of the above two cases is most unsatisfactory. Suit was brought against the surety of a deputy sheriff collector. On the trial the collector was offered as a witness, and objected to, and the court being divided, as to the admission of the witness, the evidence was not permitted to go to the jury. This, I suppose, must have been a mistake of the reporter. The objections to the admission of the evidence fails where the court are divided, and as a matter of course, the evidence goes to the jury. On an appeal the judgment was affirmed. No argument of counsel, or opinion of the court is published.

In *Jacob v. Hill*, 2 Leigh, 393, confession of judgment by the principal, a sheriff, is evidence against the surety, overruling the case of *Munford*.

We think on reason and authority the law is clear, that a judgment against the principal is *prima facie* evidence against the surety. To avoid its effect, the surety may show collusion and fraud, that the demand has been paid, or that there is a clerical mistake in entering up the judgment.

Binns and Halsted v. E. S. Williams.

We think, also, that the breach to which an objection has been made is sufficient. The breach is alleged in the terms of the condition of the bond.

The demurrer is overruled. On motion and affidavit of defendant, execution is set aside, and leave given him to plead.

BINNS AND HALSTED v. E. S. WILLIAMS.

An attachment issued under a state law which has not been adopted by Congress, or by a rule of court, can not be sustained.

The acts of Congress adopting the State practice, do not adopt future regulations.

Messrs. *Davidson* and *Holbrook* for plaintiffs.

Mr. *Douglass* for defendant.

OPINION OF THE COURT.

THIS is a suit commenced by attachment, issued January 24th, 1848, and founded upon an affidavit that the defendant had assigned, disposed of, or concealed his property, with intent to defraud his creditors.

The defendant appeared and pleaded to the declaration; and a motion is now made to quash the attachment, on the ground that the court has no jurisdiction over this form of remedy.

There was no law in force in Michigan, providing for the remedy by attachment in such a case as that made by the affidavit, until the revised statutes of 1846, which did not take effect until the 1st of March, 1847.

It is clear that the attachment law of 1846 has not been adopted by the act of Congress of May 19th, 1828, and August 1st, 1842, as those acts were not prospective. Nor has there been any rule for this court adopting it. The acts of the State regulating the process of this court are only in force by the adoption of Congress, or by rules of the court.

It is probable that this proceeding was commenced under the amendatory attachment act of 1839. That provides that an attachment may issue on filing an affidavit, "that the defendant is about to assign or dispose of any of his property," and not that he has already assigned, or disposed of any of his property, or that he has concealed or is about to conceal any of his property, as is stated in the affidavit of this case. But if this act would be considered as having been adopted by the act of 1842, its provisions could not be carried into effect by this court. That law is, somewhat, in the nature of an insolvent law, providing that all the creditors of the defendant may become parties to the attachment and that the proceeds of the attached property may be divided rateably between them. Now it would seem, as between citizens of this state, and perhaps others, that the jurisdiction of this court could not be exercised.

On the part of the plaintiff it is contended that it is too late to take this objection after a plea to the merits. There would be force in this objection if the jurisdiction was apparent upon the face of the proceedings. But here is a proceeding instituted under a late law of the State, which seems not to have been so adopted as to authorize, in this court, the procedure instituted. The attachment is dismissed.

H. DWIGHT v. J. R. WILLIAMS.

A guarantee to pay any balance that could not be collected on a certain bond and mortgage, after due course of law; held that any and every course of law, necessary to reach the property of the obligor was a condition precedent, to the liability of the grantor.

The contract created the law between the parties; and where one party contracts with another to do a certain thing, no excuse can be heard for the non performance, except the act of the obligee hindering the performance or dispensing with it.

In such a case insolvency is no excuse.

This under the rule of law, may excuse suit where the debtor is insolvent; but there is no such condition expressed or implied in the contract.

H. Dwight v. J. R. Williams.

To charge the guarantor, suit in a reasonable time was essential, and the prosecution of it with ordinary diligence.

A failure to use this diligence releases the guarantor.

Messrs. *Joy* and *Porter* for plaintiff.

Mr. *Frazer* for defendant.

OPINION OF THE COURT.

THIS suit is brought on a bond in the nature of a guaranty, in which the defendant covenanted to pay whatever should remain uncollected of a debt due by Lawrence to the Bank of the River Raisen, of \$1190, and interest thereon, from the 1st May, 1840; for the payment of which a bond and mortgage had been executed to the Bank—which debt was assigned to the defendant, and by him to the plaintiff, “when he, the plaintiff, should by a due course of law have been unable to collect the said amount and interest.” The defendant by this agreed to pay only the part of said indebtedment, which could not be collected by a due course of law. The due course of law was therefore to be used before the defendant became liable, under this covenant to pay any balance of the debt which remained.

In the declaration it is averred that there was a prosecution on the mortgage, and the mortgage property sold, and that there still remained a debt due on the bond and mortgage of the sum of fourteen hundred and ninety-nine dollars and sixty-nine cents, above demanded, and the plaintiff avers that the same sum remains due, and that by due course of law he has been unable to collect the sum or any part thereof, and that due course of law has been had for that purpose.

And the plaintiff further avers, “that the said Wolcott Lawrence departed this life on or about the 29th of April, 1843, and that at his decease, and for a long time before that time, was and had been utterly insolvent; and that his estate was worthless to the creditors having claims against the same

and utterly and wholly insolvent, and though long since closed up, paid no dividend to said creditors, and that claims against and debts were and have ever been worthless and good for nothing."

The defendant demurred to the declaration.

The mortgage bond was due the 3d of August, 1840. A bond was executed by Lawrence on 3d August, 1839, the date of the mortgage, to the Bank of the River Raisen, as collateral. On the 7th August, 1840, the bank sold and transferred these securities to the defendant, who, on the 28th March, 1842, by a deed under his hand and seal, assigned and transferred them to the plaintiff. On the 20th of December, 1842, the plaintiff assigned these securities, and all the rights he derived under the assignment, to Sauverhill. Lawrence died the 29th of April, 1843, insolvent, and was so long before his decease. On the 18th November, 1843, Sauverhill filed the bill to foreclose the mortgage, on which he obtained a decree of sale the 17th March, 1846, and the property was sold on the 18th of June of that year.

On the 28th of March, the time of the assignment of the mortgage to the plaintiff, the defendant, in the deed of assignment, covenanted, "that when he, the plaintiff, should by a due course of law have been unable to collect the said amount and interest, he the said defendant would pay to the said plaintiff, such an amount as might be necessary to make good any deficiency of principal and interest, remaining unpaid."

It is contended, 1. That no action can be maintained against the present defendant, admitting the facts set forth in the declaration to be true.

The covenant is so clearly expressed that no one can mistake it. It is not an undertaking to pay absolutely, but conditionally. The defendant bound himself to pay whatever balance could not be collected of the debt of \$1190, from Lawrence, the debtor, "after a due course of law" had been

taken. The balance could not be ascertained until the due course of law had been taken, consequently, the due course of law was a condition precedent to the suit now brought.

In *Mookley v. Riggs*, 19 John. 69, the defendant undertook that the note was good and collectable after due course of law; held, that the holder was bound to prosecute the indorser and maker, with due diligence, before he could resort to the defendant on his guaranty. A delay of seventeen months discharged the defendant. *Betts v. Turner*, 2 Cane's Cases in Error, 306; *Ten Eyck v. Tibbitts*, 1 Cane's Rep. 440.

In *Taylor v. Bullen*, 6 Cowen, 624, the defendant assigned a note to plaintiff, and promised him to warrant the collection of it, and to pay him all costs in all suits legally commenced for its recovery; held, that the commencement of a suit is a condition precedent to the enforcement of the promise. And that it is no excuse for not making the attempt that the maker died intestate, and no administration taken out on his estate. In *Cumpton v. M'Nair*, 6 Wend. 459, was a guaranty thus, "I guarantee the collection of the note." Held, that the guarantor was not liable until after the holder had endeavored to collect the money from the maker; and that it was equivalent to a guaranty, "that the note is collectable by due course of law."

In *White v. Case*, 13 Wend, 543, in a similar case, the court held legal proceedings to be a condition precedent, "and that the parties must use all the remedies presented by law," "even an attachment if the parties remove." And in *Eddy v. Stanton*, 21 Wend, 255, the defendant assigned a third party note, and "agreed, in case the plaintiff could not set off the note in payment of any balance that might be due from them to the debtors, or collect the same in some other way, or due course of law, to pay the same and all costs." Held, that there were conditions precedent, and that insolvency of debtor was no excuse. In 12 Vermont, 68, where

a party warranted "note due and collectable," held, the holder was bound to sue, and use due diligence, and if the first failed, through defective service, that guarantor was discharged.

It is an acknowledged principle, that the terms of a guaranty must be strictly pursued to make the guarantor liable. Lord Ellenborough said, "the claim as against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to show that the terms of the guaranty have been strictly complied with." 3 Eng. C. Law, 404; 29, Ib., 210; 15, Ib., 514; 25, Ib., 413.

There is no averment in the declaration of a performance of the condition precedent, but an excuse, and we are now to inquire as to the sufficiency of the excuse.

In a great number of authorities the law is thus declared:

"The act of God or of the law can not vary the terms upon which the guarantor agreed to become liable. It is a part of the consideration which can not and should not be dispensed with." 13 Wend, 544; 3 Com. Di. 96, 121; 2 Bac. Ab. 335; Chitt. on Con. 334; 19 Ward, 500.

"Where a right of action depends upon the performance of a condition precedent, performance can not be excused, unless it is dispensed with, or prevented by the opposite party, although it has become impossible." 12 Wend, 452; 6 Cowen 625; 19 John. 71; 6 Term Rep. 760. There is a distinction between the cases where the law creates a duty or charge, and the party is disabled to perform, without any default in him, and hath no remedy over—there the law will excuse him; but where the party by his own contract creates a duty or a charge, he is bound to make it good, notwithstanding any accident or inevitable casualty. Under this view, therefore, the alleged insolvency of Lawrence is insufficient. 19 Eng. C. Law 393 and note.

Was it essential that the plaintiff should allege in his declaration the performance of the condition precedent? It was

so, if the performance of the condition was necessary to establish his right to sue on the guaranty. It lays at the foundation of the action. 2 Black. 151; 2 M'Lean 26.

In his declaration, has the plaintiff shown due diligence. He received the transfer of the bond and mortgage, on the 28th of March, 1842. The mortgage money had then been due more than eighteen months. Suit was not brought on the mortgage until the 18th of Nov., 1843. One year and eight months elapsed from the time the plaintiff received the mortgage, before a step was taken to enforce it. Lawrence the mortgagor, died on the 29th of April, 1843, but suit was not brought in his life time, although he lived more than eleven months after the mortgage was in the hands of the plaintiff. And a decree for the sale of the mortgaged premises was not obtained until the 17th of March, 1846.

"A due course of law when applied to the prosecution of a demand in a court of record, confessedly means no more than a timely and regular proceeding to judgment and execution." 10 Wend. 635; 17 Ab. 111; *Phillips v. Astlus* 2 Taunt. 206; 3 Penn. Rep. 18; 16 Serg. and Rawl. 79. Suppose the statute of the State had provided in all cases of guaranty the guarantor should be held liable, if by a due course of law against the debtor, nothing could be collected. Would any court say that a suit duly prosecuted could be dispensed with. Suppose the debtor was insolvent, could that dispense with a suit? The due course of law was a condition precedent, and to give the remedy against the guarantor, a suit was as essential where the debtor was insolvent as where he was not so. That condition of the debtor was not made an excuse in the law for not complying with the condition, and the courts could not by construction hold it as an excuse, as that would be to dispense with a positive law.

The contract of the parties is not less binding than a legislative enactment, the contract makes the law between the parties, no excuse being provided for, none can be implied,

unless that which arises from the act of the other party. He may dispense with the condition, or if he prevent the other party from performing, the law will excuse the performance. Nothing else can constitute an excuse.

If, within a reasonable time, the plaintiff had brought suit against Lawrence, in his life time, no one can say what fruits might have been received by it. He may have been in possession of no property which he called his own, yet he may have had friends, or property covered which the law could reach. But it is enough to know, that suit was required by the contract, as a condition precedent, and that within a reasonable time after the contract. Suit on the mortgage was delayed eighteen months, and after suit brought three years transpired before a decree was obtained. This, it would seem, could not be the ordinary course of the law. And if there was any neglect, in this respect, the defendant would be absolved from liability under his contract.

In 4 Cowen, 103, it was held, that the plaintiff must not only issue a *fi. fa.*, but also a *ca sa.*, and that it was no answer to say the original debtor was insolvent. A delay of two and a half months has been held fatal. In 1 Cowen, 98; 5 Wend. 433, it was held that a term should not be suffered to pass without suing the original debtor, otherwise it would amount to laches.

On the part of the plaintiff it is contended that the instrument was not intended as a guaranty. In effect it certainly is a guaranty on conditions, and it is to be governed by principles of law applicable to such a case.

But he insists if it be a guaranty, the inquiry is, what loss has the defendant sustained by the negligence charged. This is not the rule; as it is not within the contract. On the contrary, it is opposed to it, as by the contract suit was to be brought. And it is argued that the plaintiff was not bound to adopt all the courses of the law. That a due course means a proper and just course to realize the debt. We suppose

DECLARATION

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CIRCUIT COURT OF THE UNITED STATES.

OHIO.—NOVEMBER TERM, 1849.

ALEX. B. BARRETT v. E. WILLIAMSON ET AL.

Where there is a conflict in the testimony, the jury must decide on the credibility of the witnesses.

This may often depend upon the opportunity witnesses had to observe the facts which they have sworn to.

In collision cases witnesses often become excited and alarmed, so as not to be in a condition to see and detail facts with entire accuracy.

The law of the river is established by usage, and this must govern those who navigate it.

All are presumed to know an established usage, and are expected to conform to it.

By this usage a descending boat is required to run in the current near the middle of the river, the ascending boat to keep near the right shore.

This being the usage, if either turn out of her course, so as to run into the other, the owners of the boat leaving her track are responsible for the damages done.

The descending boat, by the usage, as appears from the testimony, on seeing the approach of the ascending boat, is required to stop her engine and float, leaving to the other boat a choice of sides.

Under such circumstances, in view of the usage, it would be hazardous for the descending boat to back her engine, as that might bring her in contact with the other boat. The descending boat may act upon the presumption that the other boat does not intend to run into her.

And any deviation from the established usage might create embarrassment, and, perhaps, cause a collision.

In such a case, the jury will give a remuneration for raising the injured boat, repairing her, and for her use during the time necessary to fit her for use.

The jury are not bound to give interest, but they will, if they find for the plaintiff, give such damages as they shall deem just.

Messrs. *Taft* and *Mallon* for plaintiff.

Messrs. *Fox* and *Lincoln* for defendants.

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tucky shore. The Paul Jones took a direction across the river, and struck the Major Barbour, near the middle of the river. Witness is well acquainted with the proper tracks of boats ascending and descending. The Major Barbour was as near right as could be. She stopped both her engines and floated. The Paul Jones was under a full press of steam. After the contact it was more than an hour before the Major Barbour settled on the bottom of the river, near the Kentucky shore.

William Wand was pilot on the Major Barbour, and was on watch when the collision occurred. He saw the Paul Jones pass over to the Indiana shore—turned the Major Barbour nearer the Kentucky shore. The Paul Jones ran square across from the Indiana shore—witness stopped the engine, rang the bell, hailed the boat, rang the big bell. The Paul Jones approached the Major Barbour with such force as to curl the water white at its bow. When very near the Major Barbour, the Paul Jones stopped her engine, made two escapements, but struck the Major Barbour with great force. The Paul Jones was near half a mile out of her course, and was managed unskillfully.

R. C. Slaughter says, the Paul Jones came from the Indiana shore almost directly across the river, bearing up a little. Witness was standing on the starboard side, and as the Paul Jones approached, he ran to the other side of the boat. Immediately after the contact, the Major Barbour commenced sinking—she floated and settled on the bottom near the Kentucky shore. When he first saw the Paul Jones, she was one hundred and fifty yards from the Major Barbour. The shock and crash by the contact were great. The bow of the Barbour pointed down the stream.

Charles C. Molly was on the Kentucky shore, saw the two boats, one ascending, and the other descending, and saw them come together. The Major Barbour was, or appeared to be near the middle of the river, but nearer the Kentucky than

Alex. B. Berret v. E. Williamson et al.

the Indiana shore. The Paul Jones seemed to be crossing the river. Her true course was near the Indiana shore. The river at the place was more than eight hundred yards wide.

R. F. Conway was a cabin passenger on the Major Barbour. It was a beautiful, star-light night. Saw the Paul Jones coming into her—hailed her—bells rang. The collision took place near the middle of the river—nearest the Kentucky shore. The Paul Jones was square across the river, rather pointing down it.

Washington Green, an engineer, was on the Major Barbour; saw the Paul Jones coming up the Indiana shore two miles off—laid down—heard the bells, the Major Barbour's engine was stopped. The Paul Jones was not stopped when within eighty feet of the Major Barbour. The latter was from the Kentucky shore, not more than one third of the distance across the river.

N. S. Moore says, at the place of collision, the river is about eight hundred yards wide. Witness saw the Paul Jones turn across the river. The Major Barbour descending near the middle of it. The Paul Jones was not quite square across the river. To the same effect is the statement of William L. Mitchell.

G. Ostend was an engineer on the Major Barbour, and was on his watch. He stopped her engine, floated some minutes head down stream. The Paul Jones approached nearly square across the river, pointing to the Major Barbour. Two women, one man and two children were drowned. The bell on the Major Barbour, to back did not ring.

John Nestlewood is a pilot; the rule of the river is, for the descending boat to stop its engine, the ascending boat to maneuver.

James Hammond is a pilot, and states the law of the river as stated by the above witness. In certain positions, both boats should stop their engines and back. But when a boat is approaching across the river, as was the Paul Jones, the

descending boat could do nothing more than to stop her engine.

George Frazer is a pilot; the line of the descending boat is near the middle of the river; the track of the ascending boat near the Indiana shore. Witness saw the *Paul Jones* was approaching in a direction to run into the *Major Barbour*, nearly across the river, and she continued that direction until the collision.

M. Astrander, J. Vanmetre and another witness states the same as *Frazer*. *J. Vanmetre* heard the Captain of the *Paul Jones* say, if he had been up the accident would not have happened. Some ten or twelve other witnesses unite in saying that the *Major Barbour* was descending nearer to the Kentucky than the Indiana shore, and that the *Paul Jones* turned from the Indiana shore across the river and continued that direction until the collision occurred.

On the part of the defendants several witnesses were examined.

J. McCammet was pilot on the *Paul Jones*, had stood his watch on steam boats nearly two years. He saw the *Major Barbour* was going to run into them. Was running near the Indiana shore—could see the stones. The *Paul Jones* was running straight up the river, when she was struck by the *Major Barbour*. It was a slanting lick—knocked down the clay and brick on the starboard of the *Major Barbour*. Witness was backing the *Paul Jones* when the collision occurred. At the time, the rudder of the *Paul Jones* was fast on the Indiana shore. If the *Major Barbour* had run her proper course, the boats would have passed fifty yards apart. He stopped the engine of the *Paul Jones* thirty feet before the collision—the engine of the *Major Barbour* could not have been stopped.

James Kelley was mate of the *Paul Jones*. He saw that the course of the *Major Barbour* was unsteady. She seemed determined to run inside of the *Paul Jones*, next to the shore.

Alex. B. Barret v. E. Williamson et al.

At the time of the collision, the Paul Jones was pointed up the river. The course of the Major Barbour was rather quartering. The Major Barbour's lights were so dim that he could not see the upper part of the boat. The boats were three hundred yards apart when the first bell was rung.

Charles Foulkner has been an engineer thirteen or fourteen years, on the Ohio. Was in bed on the Paul Jones when the big bell awoke him—then the bell rang to back the Paul Jones—did so. Heard a man say you will smash the rudder against the shore. The collision took place seventy-five or eighty feet from the Indiana shore. The Paul Jones was in the proper track for that stage of the water.

William Wathral was in his berth on the Paul Jones when the collision took place. He saw the Indiana shore when he first went out. The Paul Jones was in the ascending track. He heard the watchman say to the pilot of the Major Barbour, if you had backed the boat all would have been well. The pilot said he did what he thought was right. Said he was a little confused, but requested the watchman to say nothing about it. After the collision, the Paul Jones backed her stern against the shore. The collision was within fifty yards of the Indiana shore.

Edward Scull says, the Major Barbour came down the Indiana shore about one hundred yards from it. She struck the Paul Jones and then sheared; the bow of the Paul Jones pointed up the stream. She pushed the Major Barbour toward the other shore.

Elisha Marshall, was mate on the Paul Jones. Was called when the bell was rung; were within seventy-five or one hundred yards of the Indiana shore. As the Paul Jones backed she ran against the shore. From the direction of the Major Barbour witness thought she intended to run between them and the shore. Her bow was pointed across the river, and was running nine or ten miles an hour.

George Sutton, was a pilot; a passenger on board the

Major Barbour. When the boats struck they were within a hundred yards of the Indiana shore. The Paul Jones was in the usual track. The blow was not heavy; thought the Barbour was not injured. The Major Barbour pointed to the Indiana shore and was within less than one hundred yards of it.

Henry Dayer, the Paul Jones was running within thirty yards of the Indiana shore. The Major Barbour ran against the bow of the Paul Jones; the engineer of the latter was backing his engine at the time. The Major Barbour was under considerable headway at the time. He thinks her engine was not stopped. After the collision the Major Barbour turned to the Kentucky shore.

John Chapman, was the carpenter on the Paul Jones. She was heading up stream. The Major Barbour ran near the Indiana shore. One minute after the collision the boats were within one hundred yards of the Indiana shore. The Paul Jones was backing.

L. Leister, was in the Paul Jones. She was close to the Indiana shore. She was in her right place, but the Major Barbour was not. The blow was not heavy. The Paul Jones did not back on the Indiana shore; she backed about one hundred feet. The Major Barbour was pointing down the river and was from one hundred to one hundred and fifty yards from the Indiana shore.

George Lesley, was asleep when the boats struck; about four rods from the Indiana shore. The Paul Jones pushed the Barbour to the place where she sunk. At the time of the collision the Paul Jones was backing her engines.

William L. Holbrook, was a passenger on the Paul Jones. Heard the bell ring, ran out on the star board side; took the boat to be lying up the river half a mile from the Kentucky shore. The Paul Jones was lying straight up the river, the Major Barbour across her bow.

N. Benby, when the boats struck, witness was in his berth, sprung up; saw Dr. Slaughter on board the Paul Jones,

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seemed not to be in his right mind. Two minutes after the collision the Paul Jones headed up stream, and the Major Barbour was quartering to the Kentucky shore.

William Hinton states that the place of the Major Barbour should have been, by the rules of the river, near the middle, and that of the Paul Jones near the Indiana shore.

Hugh Funk says, a short time after the collision, Wand, the pilot of the Major Barbour, said he was running down near the Indiana shore. Witness inquired why he did not keep the middle of the river, when Wand corrected himself by saying he thought he was in the middle. He said he did not ring the bell to back, that the Paul Jones pushed the Major Barbour to the Kentucky side.

Capt. Ross, who is a pilot, says, in the night an unpracticed eye is liable to be deceived as to the position of a boat in the river, from her lights.

Joseph Ross, has been a pilot for ten years. By the rules of the river the descending boat should float half a mile; the ascending boat takes choice of sides. Each boat should stop her engine under certain circumstances. The force of the engine would be lost in less than one-fourth of a mile. The current of the Ohio is about three miles an hour. A boat that had lost her headway would begin to back the first revolution of her engine. The proper place for the Paul Jones was from fifty to one hundred yards from the Indiana shore; the Major Barbour's track was near the middle of the river.

The above is a condensed statement of the facts, which will enable you to judge of the merits of this controversy, and to determine it as the justice of the case shall require.

There is great conflict in the testimony. The witnesses differ so essentially in their statements, that by no rule of construction can they be reconciled. The conclusion is inevitable, that some of the witnesses have sworn falsely, if not corruptly. Great allowance may be made from the circumstances under which they testify, but this can not include facts

stated, not as matter of opinion, as an estimate of distance, but facts under their own observation, and stated without qualification. And there are many such in the case, which have a most important bearing upon its merits. From the nature of the case, and the peculiar responsibility of those who were at the time engaged in navigating the respective boats, much feeling to exculpate themselves might very naturally be expected. But this should not close their eyes or stop their ears.

It is the province of a jury to weigh the evidence and judge of the credibility of witnesses. All things being equal, the witnesses who, from their position at the time of the collision, had the best opportunity of seeing the occurrences to which they swear, are more entitled to credit than the relations of those whose opportunity of observation was less favorable. Some of the witnesses saw nothing of the direction of the respective boats, until the moment of collision. Others sprang from their berths under great excitement and alarm, and of course could not have been in a condition to see or relate facts with precision.

There are some facts to which there is no contradiction. The Major Barbour was run into by the Paul Jones, so as to cause her to sink in a very short time. She appears to have floated a short distance, after the collision, sinking gradually until she reached the bottom. The place where she sunk was near the Kentucky shore. The river at the place is proved to be about eight hundred yards wide. Now these facts may well call in question the statements of the defendant's witnesses who say that the Major Barbour run into the Paul Jones, which was very near the Indiana shore, so near that her stern struck the shore, in backing out from the Barbour. And that the Paul Jones had stopped her engine, and was backing at the time the collision occurred.

The consequences of this collision were serious, not only to the Major Barbour, as she was much injured, but to three

of her passengers who were drowned. Having called your attention, gentlemen, to the evidence, the court instruct you, that if the Major Barbour was in her proper track, as proved by several of the witnesses, near the middle of the river, and the Paul Jones in ascending the river was in her proper track near the Indiana shore, and she turned out of her proper course across the river, or quartering, in the language of some of the witnesses, so as to threaten a collision with the Major Barbour, and that so soon as this was discovered the Major Barbour stopped her engine, rang her bell and floated down the stream as the custom of the river required, leaving the ascending boat the choice of sides, and this was the law of the river. That on the near approach of the Major Barbour she was not required to back her engine, as that might bring her in contact with the other boat, but might presume that the Paul Jones did not intend to run into her; and that for an injury done to the Major Barbour, under such circumstances, by the Paul Jones running into her, the plaintiff is entitled to recover such damages as appears from the evidence was done to the Major Barbour.

That if the Major Barbour turned out of her course, running near the Indiana shore, and this turning out of her course contributed to the collision the plaintiff could not recover.

That where both boats were in fault the plaintiff could not recover. That in such case the fault of the Major Barbour must have been such as to have lead to or contributed to the collision.

That if the collision was the result of an unavoidable accident, the plaintiff could not recover. That should the jury find for the plaintiff, they will give damages which shall remunerate the plaintiff for the expenditure necessarily incurred in raising the boat and in repairing her, and also for the use of her during the time necessary to make the repairs and fit her for business. That the jury were not bound to give

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interest as claimed by the plaintiff, but they would give such sum in damages as they shall deem just and equitable under the circumstances.

The jury found for the plaintiff \$6714 20 cents.

JONES v. VANZANDT'S ADMINISTRATOR.

An action of trespass on the case charging the defendant with certain wrongful acts, by which means the plaintiff lost the services of his slaves, and was subjected to expense, etc., survives under the act of Ohio of 14th February, 1824, it having been adopted by the act of Congress of 1822.

At common law all actions founded on contracts express or implied, survives to the representatives of the deceased.

But an action of tort does not survive.

If by the act complained of the master loses the services of his slave, it is an injury done to his property within the above act of Ohio.

The damages are measured by the extent of the injury.

Mr. Fox for the plaintiff.

Mr. Chase for the defendant.

OPINION OF THE COURT.

THIS is a *scire facias* to revive an action of trespass on the case commenced against Vanzant, on a charge that he assisted certain negroes to escape from the service of the plaintiff in Kentucky, by reason of which one of them was lost to the plaintiff, and for the recaption and return of the others, the plaintiff was subjected by the law of Kentucky to the payment of a large sum of money. The jury rendered a verdict in favor of the plaintiff, for twelve hundred dollars in damages. A motion was made for a new trial and also a motion in arrest of judgment.

The court, for reasons stated, granted a new trial at the cost of the defendant. But, as the costs were not paid, a new trial was not claimed, and was abandoned.

During the course of the trial certain important points were raised, on which there was a division of opinion,

between the judges, and the points were certified to the Supreme Court. That court decided the points favorable to the plaintiff, and they were so certified to the Circuit Court. But before this decision was entered in the Circuit Court, Vanzandt the defendant, died; and a *scire facias* was issued to revive the suit against his administrators.

To this *scire facias* the defendant, on the 29th of July, 1848, demurred, and this raises the question of law in the case. Does the action survive? If it does, under the 31st section of the Judiciary Act of 1789, the administrator is a proper party, and the suit may be revived against him.

Causes of actions on contracts survive by the common law to the executors or administrators of both parties. *Mellin v. Baldwin*, 4 Mass. 480. But except by statute, actions of torts, replevin, etc., do not survive against the executors or administrators, unless the estate of the deceased received some gain from the wrong, when some form of action will lie. *Pitts v. Hale*, 3 Mass. 321; *Mellin v. Baldwin*, 4 Mass. 480; *Cravath v. Plympton*, 13 Mass. 451; *Wilbur v. Gilmore*, 21 Pick. 250, 252. But by the statute of Edw. 3, ch. 7, such actions survive to him if any personal property of the plaintiff was injured by the tort. *Jenny v. Jenny*, 14 Mass. 231; *Bodlam v. Tucker*. 1 Pick. 309.

In the case of the *United States v. Ex'rs. of Daniel*, 6 How. 11, the Supreme Court held that an action on the case will not lie against the executors of a deceased marshal, for a false return made by the deputy. The court says, "if the person charged has received no benefit to himself, at the expense of the sufferer, the cause of action does not survive. But where, by means of the offense, property is acquired, which benefits the testator, there an action for the value of the property survives against the executor." And as to the form, that no action will lie at common law, against an executor, "where the general issue plea is not guilty."

Where there is a duty as well as a wrong, an action will

lie against executors. Bacon Ab., title Executors and Administrators. The rule is, that at common law a personal action dies with the person, and this has been construed to apply to injuries done by, or to the testator. But it has been held under the 4 Edw. 3 ch. 7, that the rule does not extend to an injury done to the testator of the plaintiff, when it would apply to the testator of the defendant. *Mason v. Dixon*, Cr. Car. 297; 1 Roll. Abr. 921. If a sheriff suffer an escape, the executor of the party at whose suit, the defendant was in custody, may maintain an action. But, if the sheriff had died the plaintiff could have no remedy against his executor. For a false return the executor of the plaintiff maintained an action, against the sheriff, but no remedy could have been had against the executor of the sheriff. This decision was placed upon the ground, that the injury was not done to the person of the testator of the plaintiff, but to his estate. 1 Salk. 12, S. C.

But the right to revive an action must depend upon some statutory provision, the common law applies only to the cause of action.

The act of Congress, May 19th, 1828, provides, "that the forms of mesne process except the style and the forms and modes of proceedings in suits in the courts of the United States, held in those States admitted to the Union since September 29th, 1789, in those at common law shall be the same in each of those States respectively, as are now used in the highest court of original general jurisdiction of the same, except so far as may have been otherwise provided by acts of Congress," etc. This act regulates the practice of the court, and consequently, adopts any act of the State which regulates the practice of the courts.

The act of Ohio, of February 18th, 1824, provides, "if any action of trespass on the case, for an injury done to property, real or personal, or action of trespass on property, real or personal, either of the parties shall die before judgment,

such an action or suit shall not thereby abate, but may be proceeded in to final judgment and execution in the same manner as herein before provided for in other cases."

This statute refers to an action pending and before judgment. Whether it may be construed so as to save the cause of action in the cases named, no suit having been commenced it is not necessary now to decide. Does this statute embrace the case under consideration? The Ohio statute was passed before the act of Congress of 1828, which adopted the State practice, consequently the statute governs the practice of this court. It applies to all actions of trespass on the case for injuries to property real or personal, and this is an action of trespass on the case; but it is contended it is not brought for an injury done to personal or real property, as slaves can not be considered property under the constitution and laws of the United States. They are no where denominated property in the constitution or laws of the United States; but they are treated as property under the laws of the slave States, and those laws must govern in all matters of controversy respecting the rights of property in those States. This is a principle universally acknowledged by all courts in the free as well as in the slave States.

This suit, as has been often held in similar cases, as regards the remedy, is founded on the act of Congress and the constitution of the United States. Had there been no such remedy provided, the master could not have reclaimed his fugitive slave in a free State, nor recovered damages for his abduction. But the statute, in this form of action, merely gives a remedy for a wrong done. The extent of the injury will measure the amount of damages to be recovered. And the only question that can arise is, whether the injury complained of was done to the property of the plaintiff. It was not done to his person nor to his character. If he has sustained an injury for which damages may be recovered, it must then have been in his property.

Property is the exclusive right of possessing, enjoying and disposing of a thing which is in itself valuable. It is ownership. Now, the plaintiff, residing in Kentucky, owned the slaves named in the declaration, who escaped from his service by the wrongful acts of the defendant, and which subjected the plaintiff to certain losses and charges, for which a verdict for twelve hundred dollars in damages was given him by the jury. Is not this an injury to property—not property in Ohio, but property in Kentucky, the right of which is guarantied by the constitution and act of Congress.

Literary property is the exclusive right of printing, publishing and making profit by one's own writings. The property in a slave consists, under the laws of Kentucky, in the right of the master to his services; and when he is deprived of this right illegally, he sustains an injury which the law redresses. And it is immaterial whether the injury complained of be done in Kentucky or Ohio. If the act be in violation of the law, and it shall deprive the master of the services of his slave, an action of trespass on the case is sustainable.

But it is insisted that the part of the Ohio act of 1824, which relates to the abatement of suits, does not apply to this court, as the act of 1789 provides, that suits may be prosecuted where either party dies, by the representatives of the deceased, if by law the cause of action survive; and that this excepts the clause in question from the operation of the act of 1828. That act does except, from its operation, any State statute regulating the practice, where an act of Congress has regulated the same subject.

The act of 1789 provides, that no suit shall abate, where the cause of action survives. The State statute goes further and provides, that an action of trespass on the case, or trespass on real or personal property, shall also survive. Here is no conflict. Both laws are consistent with each other, and may well stand together. At the time the act of 1828 was

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passed, the State act of 1824 was adopted, and may be presumed to have been known to Congress. By the act of 1828 Congress did not intend to repeal any express provisions made by them respecting the practice; but to facilitate the transaction of business in the courts of the Union, by adopting the practice of the courts of the respective States, which was best known to the profession.

We think that this suit is embraced by the act of 1824, and, consequently, does not abate, but may be prosecuted by the executor or administrator of either party. The demurrer is overruled.

JONES v. VANZANDT'S ADMINISTRATOR.

An action for a penalty abates, on the death of the defendant.

This is the common law, and there is no act of Congress which, by the adoption of the State act or otherwise, causes such an action to survive.

Nor is there any rule of court on the subject.

Mr. Fox for the plaintiff.

Mr. Chase for the defendant.

OPINION OF THE COURT.

IN this action the plaintiff, a citizen of Kentucky, claims from the defendant the penalty of five hundred dollars, under the act of Congress of 1793, respecting fugitives from labor, on the ground that the defendant did harbor certain fugitives who escaped from his services, into the State of Ohio. The defendant pleaded not guilty, but he died before trial, and a *scire facias* was issued to revive the suit against his administrators. To this *scire facias* the plaintiff demurs, and this presents the question whether the suit can be revived.

All actions which arise *ex delicto*, die with the person. Actions of trespass, trover, assault and battery, slander,

deceit, diverting a water course, and many other cases where the declaration charges a *tort* done to the person or property of the plaintiff, by the deceased, and the plea of the general issue must be, not guilty, abate on the death of the defendant. 1 Lord Raymond, 433, 434; Cowp. 375. If the plaintiff's goods were taken away by the testator, and still continue in specie in the hands of the executor, replevin or detinue will lie against the executor. W. Jon. 173, 174; or if they be consumed, then an action for money had and received, to recover the value. Cowp. 377.

This action is not founded on an injury done to the property of the plaintiff, but upon an act charged to have been done by the defendant, and which may not have resulted to the injury of the plaintiff, but which the law prohibits and punishes by a penalty of five hundred dollars.

By the 64th section of the Practice act of Ohio, passed March 8, 1831, it is provided, that no suit or action pending in any court except those mentioned in the 27th section, which are actions of libel, slander, malicious prosecution, assault and battery, action of nuisance, or against justices of the peace, shall abate by the death of either or both of the parties thereto.

This section embraces all actions, except those specified, which do not include the action under consideration, consequently, this suit does not abate, if the section apply to this court. The act of Congress of 1828, adopting the State practice, being prior to this act, does not adopt it, and it has not been adopted by a rule of court. The act of Congress of August, 1842, declares that "the provisions of an act entitled, 'an act to regulate process in the courts of the United States,' passed the 19th May, 1828, shall be, and they are hereby made applicable to such States as have been admitted into the Union since the date of said act." But, this act can only apply to States admitted into the Union since 1828. Unless, therefore, this suit survives under the

judiciary act of 1789, or the act of Ohio of February 18th, 1824, it must abate. It does not survive under the latter act, as the suit is not founded on an injury done to the property, either real or personal, of the defendant. And, under the act of Congress, it does not survive, as that act applies only to cases where the cause of action survives. The 34th section of that act which declares, "that the laws of the several States, except, etc., shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," has been held not to "apply to the process and practice of the courts." *Wyman v. Souhard*, 10 Wheat. 1. In the same case it is also said, by the court, "that the 34th section authorizes the courts of the United States to issue writs of execution as well as other writs."

There is no practice of the court in cases similar to the one before us, from which a rule of court may be presumed. From these considerations, it appears that this action for a penalty abated on the death of the defendant, and there is no statute or rule of court under which it may be revived in the name of the administrator. The demurrer to the *scire facias* is, therefore, sustained.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS.—DECEMBER TERM, 1850.

UNITED STATES v. DUNCAN.*

The judgments at law and charges in chancery of the Circuit Court of the United States for the district of Illinois, institute a lien throughout the State, on the real estate of the party against whom they are rendered. This doctrine treated as the law of this court until the Supreme Court shall establish a different rule.

A person who, at a judicial sale, purchases a tract of land as the property of the party against whom the judgment is obtained, and pays the purchase money to the plaintiff, can not as a general thing, call on him for re-payment.

A sale of real estate of D had taken place under a decree of this court. O became the purchaser of a piece of land and paid the purchase money to the plaintiff, but discovering that D had no title to the land, made application to the court to have the purchase money reimbursed out of moneys of the plaintiff's in court. Held, that in the absence of fraud and unfair dealing, this could not be done, but that being a judicial rule, O must take the consequences of a defect or failure of title; and that the remedy was in equity against D or his legal representatives.

If one partner withdraws funds from the partnership and pays the taxes on his private estate, the creditors of the partnership do not, in general, thereby acquire a lien on the land. This estate of the partner is still his own private property, and in case of his death, passes to his heirs or devisees, subject to that debt as to others; and if his executors make a similar appropriation of the partnership funds, the rule is the same.

Where it was alleged that A & B were partners, and after A's death his executors appropriate partnership property to the payment of taxes on his estate, and in expenses of administration, he being at the time of his death insolvent and indebted to the United States, in judgments and otherwise, which judgments were a lien on the real estate of A, the lien of the United States and their priority of payment were not thereby affected, but they could enforce their judgments notwithstanding the acts of the executors.

Where the partnership property is not sufficient to pay the debts of the firm, the priority of the United States does not reach the undivided interest of one of the partners in the partnership effects, if he is indebted to the United States, but when

*This opinion is published out of its course.

United States v. Duncan.

it has become his separate, individual property, the rule would be different. The true test is, whether the property belong to the partnership or the individual.

The creditors of a partnership applied to the State court by bill, to declare the partnership and decree the payment of the partnership debts out of assets in the hands of the administrator of one of the partners who had died insolvent, indebted to the United States. The administrator denied the partnership and took an objection based on the debts of the United States and their priority. The State court decreed in accordance with the prayer of the bill. The United States were not parties and did not appear in the State court. Held, that the proceedings in the State court did not impair the rights of the United States, and that they were not bound by them, but that notwithstanding the decree in the State court, the priority of the government attached and that whenever the proceeds of any real estate, or any personal estate come into the hands of the administrator, he became a trustee for the United States, and they must first be paid.

The acts of Congress giving the United States a priority of payment supersede all State laws upon the subject of the distribution of those estates that come within their provisions. The law makes no exception in favor of a particular class of creditors, and the priority of the United States does not yield to the claims of any creditors, however high may be the dignity of their debts.

In June, 1841, the United States reversed judgments in this court against D, subsequently in 1841 and 1842 other creditors obtained judgments in a State court against him. These last judgments were liens only on the real estate of D. situate in the county where the judgments were rendered. In 1846 the United States obtained a decree in this court directing all of D's real property in the State, to be sold to pay an indebtedness to the United States independent of the judgments of 1841. D died in 1844, his whole property not being sufficient to pay the debts due the government. Under the decree of 1846, various sales took place of real estate out of the county in which the other creditors had their judgments, and there was a fund in court arising from these sales sufficient to pay the judgments of the other creditors. The United States having made out executions on the judgments of 1841 and levied them on lands situate in the county where the other creditors held their judgments, these creditors made application to this court to compel the United States to go on lands out of that county to satisfy their judgments, or for the proceeds of the lands sold, out of that county. Held, that however it might be in the case of private individuals, the United States having an older lien, made perfect by a levy, were entitled to return it and sell the property to satisfy the judgments of 1841, and that the other creditors had no claim upon the proceeds in court.

It is a rule well recognized and understood, that where a party has a lien for a debt on two funds, and another party has a lien on one of the funds only, a court of equity will oblige the party who has the double fund to resort in the first instance, for payment, to that fund upon which the other party has no lien. But this is never done when it trenches on the rights or operates to the prejudice of the party entitled to the double fund.

But this rule does not affect, under the circumstances of this case the priority of the United States, neither is that priority affected by the suit settled in New York, that lands consisting of different parcels, subject to a general incumbrance, are, in equity, to be charged in the inverse order of the alienation of the several funds.

United States v. Duncan.

The case of *Schryver v. Tiller*, 9 Paige 173, examined and distinguished from this.

It has been uniformly held in all the cases that the priority of the United States does not disturb any specific lien nor the forfeited lien of a judgment, that is, it does not supersede a mortgage on land, nor a judgment made perfect by the issue of an execution and a levy on real estate. But in the case of a general lien it is not so clear.

The laws of the United States giving a priority to the government, are of general application in the cases therein stated, and if a debtor is to be excepted out of the general rule, it devolves upon the party alleging the exception to show it.

Mr. *Williams*, District Attorney, for plaintiff.
Messrs. *Smith* and *Brown* for the petitioners.

OPINION OF THE COURT BY JUDGE DRUMMOND.

In the year 1835, Joseph Duncan, whose representatives are the defendants in this case, became one of the sureties of William Linn, receiver of public monies at Vandalia, in this State. The principal having failed to comply with the duties imposed on him by law, the sureties became liable in the bond given to the United States.

At the June term, 1841, of this court, the United States recovered three several judgments at law against the sureties. Duncan, among others, for the aggregate sum of \$29,191 05. At the time these judgments were obtained, none of the sureties, except Duncan, had any available property, and Linn, the principal, was insolvent. On the 22d of December, 1843, the United States realized on these judgments the sum of \$23,582 65.

In January, 1844, Joseph Duncan died, disposing by will, of his real and personal estate, but making no provision other than the usual one for the payment of his debts, for the amount due the United States. At the time of his death, he was seized of a great many tracts of land lying in different counties of this State, and in Morgan county, his place of residence.

The judgments of 1841, in this court, not covering the de-

falcation of Linn, the plaintiffs instituted suit at law, to the December term of this court, 1844, against William Thomas, as administrator, etc., of Joseph Duncan, the executors having resigned or ceased to act; and at that term recovered judgment against the administrator, *de bonis testatoris*, for the sum of \$48,151 61.

In February, 1846, the United States filed a bill in this court, setting forth most of the facts detailed above, and asking for a discovery of the title papers and estate of Duncan; insisting upon the priority of the plaintiffs; and praying for an account of the money due the United States; of the personal estate of Duncan; and of the value, rents and profits of the real estate; and that if the personal estate was not sufficient, the real estate might be sold to pay the debt due the plaintiffs. To this bill, the widow, heirs, executors, devisees, etc., of Duncan were made parties. During the progress of the cause, the value of the widow's dower was agreed upon and amicably settled, and she relinquished. Answers were put in by the defendants, and at the June term, 1846, a decree was rendered in favor of the United States for the sum of \$49,156 15 (that being all that was due except what had not been collected under the judgments of 1841,) and ordering the real estate of Duncan to be sold, and the proceeds to be paid to the United States, "first paying prior liens, if any."

Under this decree, various sales of real estate out of Morgan county have taken place, under the direction of a commissioner, for which very considerable sums have been realized, part of which have been paid over to the United States, but there remains the sum of \$4,052 subject to the order of the court.

Personal property to the amount of \$300 was sold under the judgment of 1844.

There were two judgments recovered against Duncan in his life time, in the Circuit Court of Morgan county, of this State, one by McConnell and others for \$333 76, in Novem-

ber, 1841, and the other by Matthews for \$497 35 in March, 1842. On the 10th of November, 1845, Doremas, Suydam & Nixon filed a bill in the same court against William Thomas, administrator, etc. of Duncan's estate, alleging that certain personal property which the executors of Duncan had sold, and the proceeds of which, amounting to \$960 60, it seems they had applied to the payment of taxes on real estate and expenses of administration, belonged to a firm of which one James M. Duncan and Joseph Duncan, in his life time, were partners, and that the plaintiffs were creditors of that firm, and claiming that they (Doremas, Suydam & Nixon) should be re-paid the money so used by the executors, and that they should be substituted in their place; insisting it was a former claim. James M. Duncan, also one of the sureties of Linn, was a party to this bill, but he was insolvent. The administrator in his answer denied the partnership, and referred to the claim of the United States and their priority, and to the proceedings in this court, which he set forth at length; but the Circuit Court of Morgan county, by a decree rendered on the 17th November, 1847, found that the partnership did exist, as stated in the bill; that at the death of Duncan, the goods and chattels referred to, and the proceeds of which had gone into the hands of the executors, were liable for the partnership debts, wherever traced, and ordered that the plaintiffs should be paid out of the estate of Duncan. To Doremas & Nixon, \$766 48; to Wm. A. Ranson & Co., \$194 12. The latter had been made parties and Suydam had died pending the suit. The court further adjudged that inasmuch as it did not appear the administrator had any assets in his hands, he should pay the above sums out of assets thereafter to come into his hands, or which might remain in his hands after the settlement of his accounts as administrator. It is proper to add, that an objection was made in the answer of Thomas, because the United States were not made parties, but the court decided that it was not necessary to make them parties.

It was conceded that the judgments of 1841, rendered in this court, were a lien on all the real estate of Duncan within the State; that the decree of June term, 1846, operated to the same extent, upon the real estate in the hands of the heirs, devisees, executors, etc., of Duncan;* and that the judgments of the Morgan circuit court operated only upon real estate within the county of Morgan. The judgments and decrees rendered in the Circuit Court of Morgan county, are yet in force, not being paid or satisfied, except some partial payments hereafter mentioned.

The judgments at law of this court recovered in 1841, being only paid in part, the United States in 1847 issued alias executions on those judgments, and the marshal levied them on lands lying in Morgan county of which Duncan had been seized, and they were sold by the plaintiffs.

Joseph Duncan, at the time of his death, did not possess sufficient property, including real and personal, to discharge the debt he owed the United States, the lands out of Morgan county not being of value enough to satisfy the decree of June term, 1846. And it does not appear that there was more than sufficient property in Morgan county, to meet the balance due on the judgments of 1841 of this court.

In this condition stood the case, when, on the 15th of June 1847, McConnell et al. and Matthews filed their petition in this court.

The petition of McConnell et al. alleges that under the decree of 1846, sales of lands without the county of Morgan

*The opinion of the profession in Illinois is so general in favor of the doctrine that the liens of judgments of the United States Court is co-extensive with its jurisdiction, as stated in the text it was not controverted in the argument. See the question discussed in a report which was confirmed by the Circuit Court of the United States, for the Eastern District of Pennsylvania, contained in the case of *Bayard v. Lombard et al.* 9 Hammond's Reports, 530. The Supreme Court of the United States held that the decision of the circuit court was final and conclusive under the circumstances, and could not be reversed; consequently no opinion was given as to the lien of judgments obtained in the Circuit Court of the United States Wallace, jr. Reports, 196, S. C.

had taken place, upon which had been made \$3,555 20, which, it insists ought to be, as to the lien of their judgment, a credit on the judgments at law of the United States of June 1841—that there are lands out of the county of Morgan more than sufficient to satisfy those judgments, and that the United States are proceeding to sell real estate in Morgan county. The petition calls for the interposition of the court to arrest the sale; to marshal the securities so as to give them the benefit of their lien, by throwing the judgments of the United States of 1841, upon lands out of Morgan county and that the sum made \$3,555 20 be applied upon those judgments. The petition of Matthews is, in all respects, similar to that of McConnell et al.

A *fi. fa.* had issued on the judgment of McConnell, and \$60 00 had been obtained on it. A *fi. fa.* had also issued on the judgment of Matthews, and real estate had been levied on, and \$393 00 made by the sale of it. The executions in each case were issued within a year after the judgments were obtained respectively.

On the 23d of December, 1847, Doremas & Nixon, and A. Ranson & Co., likewise filed a petition setting forth most of the facts heretofore mentioned, and alleging that this court had taken full administration of the estate of Duncan—that their decree of the Morgan court of November, 1847 had been rendered useless—that there was no priority of payment to the United States, till the estate was ready to be disbursed—that taxes and costs of administration were to be first paid—that under the circumstances they stand as the state and individuals, and were clothed with their rights—that there was more real estate to be sold, and their partnership fund had increased the amount to be disbursed in this cause—and asking that their decree be paid out of money received from the sale of real and personal estate, or, if that be not proper, that the commissioner of this court be ordered to sell land enough to satisfy the sum named in their decree and pay it over to them.

Various supplemental petitions were filed by all the parties, from time to time, bringing before the court the proceedings that have since taken place in this cause, and particularly stating that other lands, out of Morgan county had been sold, under the decree of June, 1846, and the money received, and that the sum of \$3,789 56 was made by sale of land in Morgan county under the judgment of 1841.

The petition of O'Donoghue, which was filed on the 10th of January, 1849, states that he had purchased a lot of land at a sale made by the commissioner in this cause, which lot was sold as a part of the estate of Duncan; that he paid the commissioner for it, and that Duncan had no title to it, having before his death by deed duly recorded, conveyed it to the Illinois College, and he seeks to have the sale by the commissioner annulled, and to have the money paid by him reimbursed out of the fund in court.

When these petitions were presented, this court, without determining the questions sought to be raised by them, ordered that a sufficient fund should be reserved to satisfy their claims, which was to be paid to the petitioners, provided the court should be of opinion upon the final disposition of the cause, that the parties were entitled to receive the amounts they sought. And there is now a fund of more than four thousand dollars awaiting the decision of the questions presented by these petitioners.

These are the material facts:

The applications were once heard before the former judge of this court, but no decision was given or order entered. They have, therefore been fully argued before me, and it now becomes my duty to announce my opinions upon the different questions presented.

The counsel of the United States, not denying the allegations contained in the petitions, insists that the petitioners are not entitled to the relief they seek, nor to any relief.

As the petition of O'Donoghue stands upon a footing

entirely different from the others, it may be convenient to consider that first.

The sale under which he purchased the lot was made by the order of this court, and it is well settled that in all judicial sales there is no warranty; but that the rule of *caveat emptor* applies. *Owings v. Thompson*, 3 Scammon 502. If there be fraud or concealment or any unfair dealing, that may be a ground for an application to a court of equity; otherwise the purchaser must look to the soundness of his title. This is the established rule in England and throughout the United States, and it should be peculiarly applicable here, where it is so easy to trace the title to real estate, the sources, in nearly all cases, being the public records of the country. It is true where a plaintiff in an execution purchases a tract of land, belonging apparently, or which he supposes to belong to the defendant, and there is, in fact, no title, a court will interpose and place the parties in their former condition. But that is because it is a matter between themselves; the purchase having neither benefited nor injured any third person: and it has been decided, that where there was no fraud and a stranger to the execution purchased a piece of land as the property of the defendant, where he had no title, a court of equity would compel the judgment debtor to refund the amount to the purchaser, on the ground that his purchase had paid the debt. But no case has been shown in which, under such circumstances, the purchaser could call upon the plaintiff in the execution to refund the amount. Indeed the case just mentioned is conclusive that he could not, for it is because the sale must so far stand as to enable the plaintiff to retain the money paid, that the defendant is liable. It could make no difference, that the money, instead of being in the hands of the party, was held by the officer or paid into court. In either case, it would seem, the right of the party to the fruits of his judgment could not be contested.

But conceding that this last position may be questionable, still after the money has actually been paid to the party, it is

beyond the reach of the purchaser. Here the money paid by the petitioner has been received by the plaintiff, and he seeks to make another fund, now in court, arising from the sale of other property belonging to the estate of Duncan, liable to the claim.

On the part of the petitioner the court was referred to *Lansing v. Quackenbush*, 5 Cowen, 38, a case where the defendant had represented he was the owner of lots, which the party purchased, and it turned out he was not. On application to the court, they said there was a remedy but that it was in equity. Here was a false statement, and if the plaintiff were not a party to it, the remedy would be against the defendant. *Adams v. Smith*, 5 Cowen 280, was also referred to. In this case the sheriff had sold personal property which did not belong to the defendant, and the real owner sued the sheriff and plaintiff jointly and recovered. The court allowed the amount made on the sale and indorsed on the execution, to be stricken out and an execution to issue for the amount of the original judgment. In this case it was personal property, and the owner resorted to the remedy which the law gave him, the property remaining with the purchaser. Both cases are very shortly reported and clearly distinguishable from the present. But the Supreme Court of Illinois have held, under somewhat similar circumstances, there was no remedy against the plaintiff in the execution. A party purchased some property under an execution. A stranger sued for and recovered the property from the purchaser. The latter then brought suit against the plaintiff in the execution to recover back the purchase money. The court decided that the plaintiff was not liable. *England v. Clark*, 4 Scammon, 486. These were all cases of personal property, but in a sale of real estate under execution, no action is brought, because if the property of A is sold on an execution against B the title to the property is unchanged, and A ordinarily suffers no wrong.

In a very recent case, however, *Dunn v. Frasier*, 8 Blackf. 432, this question was directly decided. That was a much

stronger case than this. A judgment had been obtained and an execution was issued and returned *nulla bona*, and afterward the judgment creditor filed a petition alleging that the judgment debtor was the owner of certain real estate in fee simple. On the application of the petitioner the court ordered the real estate to be sold on execution. It was sold accordingly, and Frazier became the purchaser. One of the administrators of the judgment debtor was present at the sale, and solicited Frazier to buy, assuring him that the title was good. Various proceedings took place, during which Dunn, the judgment creditor, transferred the judgment to one Adams, and Frazier refused to pay the purchase money. Another execution was issued which was enjoined. Finally Frazier paid part of the money to Adams and the remainder into court, (to the clerk). The judgment debtor had no title to the property. These facts being made to appear to the court below, by bill in chancery, it ordered the money to be paid back to Frazier, but the Supreme Court of Indiana reversed the decree, on the distinct ground that a purchaser who buys land and pays the money, the judgment creditor receiving it, can not recover it back from the creditor, either at law or in equity, merely because the judgment debtor had no title to the land. The proper course in such a case was to proceed against the judgment debtor or his estate by bill in equity. And even in relation to the money in court, it depended altogether upon the fact whether there was anything due on the judgment, or it was an overplus, in which last count it might be paid over to the purchaser. And see *Warner v. Helm*, 1 Gil. Rep. 220.

It will be seen, therefore, from these principles and authorities, the petitioner, while he has no claim upon the fund now in court, has a remedy against the estate of Duncan. That it may be unavailing is his misfortune. If the petitioner obtain the money he has paid, it must be by the voluntary act of the plaintiff, and not by the order of this court.

Let us now proceed to consider the petition of Doremus & Nixon, and A. Ranson & Co. They insist that, inasmuch as there was a partnership between James M. and Joseph Duncan, and the executors of Joseph Duncan had used the partnership goods to pay the taxes on his real estate, and the expenses of administration, they, as creditors of the partnership, have a right to be repaid out of the fund in court.

There can be no doubt that the partnership effects are primarily liable for the partnership debts, and that those effects ought not to be appropriated to the payment of the separate liabilities of one of the partners. And if the executors knowingly diverted them in the manner charged in the bill filed in the circuit court of the State, they acted illegally. But conceding this, it does not follow that the partnership creditors thereby obtained a lien upon the separate property of Duncan. No authority has been referred to which shows that if one partner withdraws funds from the partnership, and pays the taxes on his private estate, the creditors of the firm thereby acquire a lien on the land, unless, indeed, the decree on which the application now under consideration is founded may be so regarded. All that can be said is, that the estate of the partner becomes liable to the creditor of the firm. The estate of the partner is still his own private property, and, in case of his death, passes to his heirs or devisees, subject, if he has used the partnership funds for the purpose mentioned, to that debt as to others. Story on Part. §§97, 326, 358, 359, 360 and 361. Neither would the use of the partnership funds by the executors, in the expenses of administration, create any lien upon the estate. It would still be a debt due from the estate. And, if the creditor of the firm were placed in the condition of those individuals to whom those expenses had been paid, it is doubtful whether that circumstance, for reasons presently to be given, would affect the question.

It has been decided that the priority of the United States

does not reach the property of a partner in partnership effects, so as to pay the separate debt of one of the partners (he being the debtor of the United States) when the partnership property is not sufficient to pay the debts of the firm. *United States v. Hack*, 8 Peters, 271. But that proceeds upon the presumption that they are partnership effects. It is plain, if they had ceased to be such, and had become the separate property of the one indebted to the United States, the doctrine would be different. The true test would seem to be whether the property belonged to the firm or the individual.

Now it is to be remarked that these petitioners did not ask the court of Morgan county to do more than to declare the partnership, and to decree the payment of the partnership debt out of assets which were at that time, or thereafter to be, in the hands of the administrator. They claimed, at most, not a lien on the estate, but a priority of payment out of the estate. And the court, though it expresses the opinion that the funds of the partnership effects were liable to the debts of the petitioners where ever they could be traced, decides they were to be paid out of the estate of the testator. Accordingly, in whatever light we may regard this decree of the circuit court of Morgan county, it is clear it intended that payment of the debts was to be made out of Duncan's estate, when there should be sufficient assets for that purpose in the hands of the administrator. The court does not even decree that the petitioners shall be first paid, but there is an alternative that they may be paid, when the administrator, upon the settlement of his accounts as such, shall have money then remaining in his hands. The decree did not create any lien, specific or general, upon any fund, nor upon the real estate of the testator, as it probably could not; and it does not vary essentially from the usual judgment against an administrator for the debt of a deceased party.

Though an objection was taken to the proceedings in Morgan county, because the United States were not made parties,

it is said that the decree is binding on them in this court in this application, on the part of the petitioners. Let us now examine this position, and endeavor to ascertain whether this is so.

At the time of Joseph Duncan's death, his indebtedness to the United States, except the balance due on the judgments at law of this court, of 1841, did not constitute a lien upon his real or personal estate. The plaintiffs had only a right to a priority of payment. And it may be admitted, for the purpose of this argument, that their priority did not extend, in point of law, so as to operate upon the real estate of which Duncan died seized, in the hands of heirs or devisees. But at the time the petitioners filed their bill in the Circuit Court of Morgan county, there was a judgment of this court against William Thomas, as the administrator with the will annexed, etc., of Duncan, and at the time the final decree was rendered in the Circuit Court of Morgan county, there was and had been for more than a year, a decree standing in this court, which took effect upon all the real estate of Duncan within the State, and directed it all to be sold for the payment of the debts of the United States, first paying prior liens. When this decree was rendered in June, 1846, the claims of the petitioners were certainly not a prior lien binding the estate. If, then, we give effect to the decree in the State court, we are not the less bound to give full effect to the judgments and decree in this court; and we will now proceed to show that it must be considered subject to those of this court; that under the law and by virtue of the proceedings here, the decree of the Circuit Court of Morgan county could not become operative until the claims in this court were satisfied.

The petitioners have not sought to enforce their decree in the State court; indeed, so long as there is nothing in the hands of the administrator, it would not, by its terms, be enforced. They come into this court and request its action on their claims.

By the 5th section of the act of 3d March, 1797, it is provided, that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied. 1 Statutes at Large, 515. This applies to two classes of debtors. Those who are insolvent, and those, whose estates, in the hands of executors or administrators, are not sufficient to discharge all the debts due from the estate. It was intended to reach the property of the debtor, whether living or dead. It has been decided that this section is applicable to all debtors of the United States. Joseph Duncan's estate was the estate of a deceased debtor of the United States, and when it comes within the other requisition of the act, that is, whenever it came into the hands of executors or administrators, then the operation of the law was complete. The doctrine of the Supreme Court of the United States, as founded on this law and a similar one, (act of March 2d, 1799, sec. 65,) as it respects this point is, that the party, whether assignee, executor or administrator, into whose hands the estate of the two classes of debtors mentioned, passes, becomes a trustee for the United States, and from the fund in his hands, they must first be paid. *Beaston v. The Farmer's Bank of Delaware*, 12 Peters, 102; *Brent v. Bank of Washington*, 10 Peters, 596. If it be admitted that the priority of the United States did not extend to the real estate of Duncan, in the hands of heirs or devisees, as already stated, because it does not attach as against them, still when the real estate or the proceeds thereof passed to, or vested by law in, the hands of the executors or administrators, the priority did attach. *United States v. Crookshank*, 1 Edwards Chan. R. v. 33. Consequently, whenever the proceeds of any real estate, or any personal estate came into

the hands of Thomas, as the administrator, he, having notice of the debt due the government, became a trustee for the United States, and was obliged to pay them first, independent of the judgment of December term, 1844, and the decree of June term, 1846, of this court. These merely determined the amount of the debt, but in no degree changed his duty in the premises.

It is to be observed that this law of Congress supersedes all State laws upon the subject of the distribution of those estates that come within its provisions. The language of the Supreme Court of the United States, in *Thillison v Smith*, 2 Wheaton, 396, is, that there is no exception made by the law in favor of a particular class of creditors. And the same court, in *Connel v. The Atlantic Insurance Company*, 1 Peters, 444, say, that the priority of the United States does not yield to any class of creditors, however high may be the dignity of their debts. It follows, then, if these principles are correct, that the claims of the petitioners cannot bind any funds in the hands of the administrator, nor any lands sold under the judgments or the decree in chancery of this court, nor the proceeds of the same, notwithstanding the decree of the Circuit Court of Morgan county; for whatever may be the effect of this last decree, it can not operate, under the circumstances, so as to impair the rights of the United States. *Field v. The United States*, 9 Peters, 182.

The remaining question is as to the effect of the judgments at law of the circuit court of Morgan county. As the rights of the petitioners, whose claims we are now to consider, depend upon the same principle, we will examine them together. This, then, was the position of the parties. The United States had judgments binding all the lands of Duncan throughout the State, prior, in point of time, to the judgment of McConnell and others, and that of Matthews, which last two judgments were binding only on lands in Morgan county; and the United States had a decree subsequent and

subordinate to both, but which, in extent, had the advantage of operating, like the judgments of June, 1841, throughout the State. The petitioners insist they have a right to throw the judgments of 1841 upon lands without the county of Morgan. They assert that at the time their judgments became liens upon the real estate in Morgan county, the United States, having also judgments which were liens upon that land, and which were, besides, liens upon lands out of Morgan county, are compelled to go upon these last mentioned lands upon the principle, well recognized and understood, that where a party has a lien for a debt on two funds, and another party has a lien on one of the funds only, a court of equity will oblige the party who has the double fund, to resort, in the first instance, for payment to that fund upon which the other party has no lien. And it is contended that the circumstance of the United States procuring a decree binding the lands out of Morgan county, before the application is made here, can make no difference. Another principle is also involved, which may be considered settled law in New York at least, that where there is a general incumbrance upon distinct parcels of land, and the owner aliens them at different times to different persons, the parcel last sold is to be first charged to its full value to pay the general incumbrance, and so on backwards. The argument is this: If Duncan had mortgaged all his lands in the State to the United States, for the payment of thirty thousand dollars, and then had mortgaged his lands in Morgan county to these petitioners for the amount of their judgments, and afterward all his lands out of Morgan county to the United States for forty-nine thousand dollars, these lands out of Morgan county, being the last aliened, are, according to the doctrine above mentioned, to be first charged with the payment of the sum first named. And it can make no difference, it is said, if, instead of mortgaging the lands out of Morgan county, he had mortgaged all of his lands in the State over again;

because, it will be seen, in order to adapt it to this case, we must include all the land, the decree of 1846 of this court binding the lands in Morgan county as well as elsewhere. It is urged that these being judgments, the principle is the same.

This is stating the proposition fully, and carrying the analogy to as great an extent in favor of the petitioners as was contended for by their counsel in the argument.

The doctrine that where a man owns different parcels of land, and transfers some of them, himself also retaining some, all the parcels being subject, before the transfer, to a general incumbrance made by him, the part which he still retains shall be applied to the payment or discharge of that general incumbrance, rather than that which he has transferred, is founded on the plainest principles of equity. It would be manifestly unjust that those persons to whom he had made transfers should be compelled to pay off the incumbrance, when he held land which would satisfy it. Accordingly, it has been held, under such circumstances, that the property transferred is only liable, in the event of the part remaining in the owner not being sufficient to discharge the incumbrance. On the other hand, the doctrine already mentioned as settled in New York, that land consisting of different parcels, subject to a general incumbrance, is in equity to be charged in the inverse order of the alienation of the several parcels, has been sometimes questioned, and Judge Story thinks it is not maintainable upon principle, and inclines to the opinion that there should be contribution, in such cases, according to the relative value of the estates. Story's Equity Juris. §§634 a, 1,233 a.

The New York doctrine was pressed very far in the case of *Schryver v. Tiller*, 9 Paige, 173, and as that was cited in the argument by the counsel of the petitioners, and considered conclusively settling the principles which should govern this case, it may not be improper to give it a particular examination.

In that case, the owner of two parcels of land—one at Coxsackie, the other at Redhook—having encumbered both by judgments, and each by mortgages, on the 28th of May, 1840, mortgaged the Coxsackie property, and on the 7th of July following mortgaged it again to another person. On the 9th of June, of the same year, he mortgaged the Redhook property, and again on the 12th of the same month, this last being given to the same persons that held the mortgage of the 7th of July on the Coxsackie property. On the 3d of June, 1840, a judgment was docketed, which was a lien on both. The parties who held the mortgage of the 7th of July on the Coxsackie property, and those who held the mortgage of the 9th of June on the Redhook property, at different times and in different courts, filed bills for foreclosure, and at different dates obtained the usual decrees for sale of the property, the Master having reported as to the priority of the several liens. On the 2d of March, 1841, the Redhook property was sold for an amount sufficient to satisfy all the liens on it prior in point of time to the mortgage of the 28th of May, 1840, on the Coxsackie property. On the 23d of March, 1841, this last property was sold for an amount not sufficient to pay the costs of foreclosure and the mortgage of 28th of May, if the previous judgments, as well as the prior specific liens on that property were paid out of such sale.

Under these circumstances the holder of the mortgage of the 28th of May, made application to the court for a modification of the original decree, so as to throw the judgments on the surplus proceeds of the Redbank property, after satisfying all liens thereon prior to his mortgage. The court allowed the application on the ground that as the Redhook property was more than sufficient to pay all liens on it prior to the date of the applicant's mortgage, in case the judgment creditors, who held liens at that time, sought to enforce them on the Redhook property, if the applicant paid them, he would

have a right in equity to insist on an assignment of them, so that he might have a repayment out of the surplus funds, in preference to those who had liens on that property accruing after the date of his mortgage. For instance, the judgment creditors had liens on both properties, when his mortgage was taken on one. (Coxsackie.) If, in enforcing these liens it would prejudice his mortgage, he would have a right in equity to compel them to go upon the Redhook property, because certainly, he could be in no better position by taking an assignment of the judgments than those who held them. Let us suppose the case put had actually happened—that the applicant had purchased the judgments; then he would be the holder of judgments binding on both properties and of a mortgage on one. The doctrine of the court is that in this condition, he could go upon the Redhook property to satisfy his judgments in preference to one who had a lien on that property accruing after his mortgage. The court illustrated it by saying; if there had been a mortgage on both properties, and it had been foreclosed, the decree would require the property to be sold separately, and the proceeds so to be marshalled as to pay general liens on the whole, out of that part of the fund arising from the sale of the Redhook property, thus far giving the applicant the benefit of his priority on the Coxsackie property over a subsequent incumbrancer of the Redhook property.

In the case just cited there was a general incumbrance binding both parcels, also specific incumbrances binding each, and a transfer made of one and then the other; and it seems to proceed upon the principle, that inasmuch, as at the time when the transfer was made of one of the parcels, the party would have the right to compel the general incumbrancer to go upon the parcel not affected by the transfer, no subsequent act of the owner in relation to that other parcel could change his rights. Whether it would make any difference if the general incumbrance and the transfer of the

second parcel were held by the same person, does not appear; but it is certain, he would, in one sense, come within the qualification of limitation of the rule laid down by Judge Story. He says that though the rule—that is if a creditor has two funds he shall take his satisfaction out of that fund upon which another creditor has no lien—is so general, it is never applied, except where it can be done without injustice to the person who has the double fund as well as the debtor. It is never done when it trenches upon the rights or operates to the prejudice of the party entitled to the double fund. Equity Jurisprudence, etc., §§ 558, 559, 560, 633. The object is to satisfy both creditors. It is apparent, however, whenever the double fund is insufficient to pay all the claims against it, and the same person has the right to proceed against both, and against one alone, it does affect the right of the party entitled to the double fund. For example, in this case, the United States have a general lien upon different parcels of land; creditors—the petitioners—have also a general lien upon some of the parcels; and the United States have a lien which may well be considered specific upon all the parcels. Now it is plain if the creditors turn the general lien of the United States over to the lands not bound by the lien of the creditors, under the facts of this case, it diminishes by so much the fund which is to satisfy the decree of 1846. In other words, whatever is paid to the petitioners is an absolute loss to the plaintiff. Notwithstanding such would be the effect, in this case, upon the party entitled to the double fund, it may be questionable whether the circumstance of taking a subsequent lien, could or ought to place them in a better position; certainly not if the true reason be given for the rule in the case in Paige. To apply the argument of that case to this;—if these petitioners had paid off the balance due on the judgments of the plaintiffs of 1841, they would have the right in equity to insist upon an assignment thereof.

The case of *Schryver v. Felter*, if he admit it was rightly ruled, must be regarded as deciding that a general lien will be thrown upon a particular parcel of land so as to give a party having a mortgage the benefit of his priority over subsequent incumbrances either of the whole or a part; that is where the question is dependant upon priority of time alone. But it does not follow that this would be the rule where there is a priority of right—that is in a case where the parties as such, do not stand upon an equality of right.

Let us, therefore, examine how far the character of the parties in this case, affects the question. The plaintiffs constitute the sovereign power of the country, and, according to the jurisprudence of most States, under certain circumstances are entitled as a creditor to peculiar privileges. It was so under the Roman law; is so under the law of England, and under our own.

We must bear in mind that the statutes giving the government a priority are presumed to have for their object the public good, and are, therefore, to be liberally construed. *United States v. State Bank of North Carolina*, 6 Peters, 29. *Braston v. Farmers' Bank of Delaware*, 12 Peters, 134.

The application was presented in this case, after a levy had been issued by the United States, upon lands in Morgan county, under executions issued on the judgments of 1841. The lands were sold and the money appropriated upon those judgments, subsequent to the filing of the original petitions, as appears by the supplemental petitions. This court did not interfere with the proceedings under the executions, but suffered them to continue, and directed that there should be reserved a sufficient fund to meet the claim of the petitioners, from what might be made by the sale of lands in this case. The rights of the petitioners ought, perhaps, for that reason, to be considered the same as if the money arising from the sale of the Morgan lands, had been paid into court, subject

to its order herein. And, apparently, it should be governed by the same principles, as if the petitioners, instead of pursuing the course they have, had applied to a court of equity to restrain the proceedings on the executions—waiving for the purpose of the supposed case all objections on account of sovereignty—and the United States had come and given, in answer, the decree of 1846, the indebtedness of Duncan's estate; in fine stating all the facts and claiming a priority of payments under the law.

It would seem upon principles as well as by the authority of adjudged cases—if we throw out of view the decree of 1846 and the question of sovereignty—there could be no doubt of the right of the judgment creditors to compel the plaintiffs to look to lands out of Morgan county, not bound by their lien, for the satisfaction of the balance due the United States upon the judgments of 1841, for in that case there would be property sufficient to pay both. It is true, technically speaking, the petitioners, if they paid the judgments of 1841, could not compel the plaintiffs to assign those judgments to them, because they could not directly reach the United States. *Hill v. United States*, 9 Howard, R. 386. But if this difficulty were avoided, the question is whether the decree of 1846, which operated specifically upon lands not affected by the judgments of the petitioners, changes the principle.

It must be conceded the question is not free from embarrassment in consequence of the difficulty of extracting from the various cases which have been decided, the true rule of interpretation of the acts of Congress, laid down by the Supreme Court.

The petitioners had taken out executions on their judgments within a year after they were rendered; on one some real estate—not in question here—had been sold, on the other a small payment had been made, as to the balances due on them respectively, the judgments became general liens.

It has been uniformly held in all the cases that the priority of the United States does not disturb any specific lien, nor the perfected lien of a judgment, that is it does not supercede a mortgage on land, nor a judgment made perfect by the issue of an execution and a levy on land. *Thelluson v. Smith*, 2 Wheaton, 396; *Cunard v. The Atlantic Insurance Company*, 1 Peters, 386.

But in the case of a general lien it is not so clear.

The case of *Thelluson v. Smith*, if it is not considered, as in some respects, overruled by the case of *Cunard v. The Atlantic In'e Co.*, certainly establishes the doctrine that the priority of the United States does not yield to a judgment which is a general lien upon real estate. The facts were, that Thelluson and others received a judgment against Crammel, which it was admitted by the court, was a lien upon his lands on the 30th of May, 1805. Afterwards he made an assignment of all his estate, being insolvent, and in debt to the United States so as to bring him within the operation of the acts of Congress. The United States subsequently brought suit against him, had judgment, sued out execution, levied on and sold an estate called Sedgely, admitted to be bound by the judgment of May, 20th, 1805. The marshal having received the proceeds, Thelluson and others brought suit against him. They had not issued execution nor levied on the estate by virtue of their judgment. One of the questions made in the case was, whether the United States were entitled to be paid in preference to the judgment creditor? This the Supreme Court decided in the affirmative, concluding by saying, "a judgment gives the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. But the act of Congress defeats this preference." This was under the act of 1799, but we have already seen that in this respect it is like the act of 1797.

This case was particularly examined and reviewed in *Cunard v. The Atlantic In's Co.* It is there said that *Thel-*

luson v. Smith was a case where a judgment creditor sought to recover the proceeds of a sale of land made under an adverse execution, on the ground that he had a general lien by judgment on the land; and in such circumstances the action was not maintained. The real ground of the decision, the court says, was that the judgment creditors had never made his lien specific; that he had no title to the proceeds in his property; and if they were to be deemed general funds of the debtor, the priority of the United States attached; that a mere lien on land did not convey the legal title to the proceeds of a sale made under an adverse execution; the case did not establish the principle that a specific lien could be displaced by the priority of the United States, because that priority was not of itself equivalent to a lien.

Judge Johnson, in his reported opinion, says, that he never acknowledged the authority of the case of *Thelluson v. Smith* on the point supposed to be decided by it, the precedence of the right of the United States as to a previous judgment in the case of a general assignment, and that he concurred in it only because of the want of privity between the parties. He thought the sale of the Sedgely estate under the execution was a nullity, because the assignment of Crummond divested all his interest, so as to place it beyond the reach of the execution issued on the judgment of the United States. Suppose, however, the assignees in whom the estate had vested, admitting it had vested, had sold it, notwithstanding the lien, then, according to my understanding of the case of *Thelluson v. Smith*, also as corrected and explained in *Cunard v. The Atlantic Insurance Company*, the proceeds of the sale, in the hands of the assignees, would have been subject to the priority of the United States. As in this case, if the lands in Morgan county had been sold by the executors or administrator, under the authority of the will or the law, the proceeds would have been liable, not to the judgment creditors (the petitioners), but to the United States; it being understood in

all such cases that the executor or administrator in whose hands were the proceeds, had notice of the debt due the government.

In *Cunard v. The Atlantic Insurance Company* the court are careful to say the priority of the United States does not affect any specific lien; but in the case of *Brant v. The Bank of Washington*, 10 Peters, 596, the court state that it has never been decided that the priority of the United States affects any lien, general or specific, existing when the event happened which gave them the priority.

Suppose, then, the case of *Thelluson v. Smith* may be considered as shaken, and, indeed, overruled, about which some doubt may be entertained, so far as it gives a preference to the United States over the general lien of a judgment creditor, it would follow that the judgments of these petitioners would not be affected by the mere force of the statute of 1797; and, possibly, we might go further, and say they would not be affected by any mere judgment or decree in favor of the United States, or the indebtedness of Duncan's estate, rendered after the date of the judgments of the petitioners. But this court is asked to go some further; to say that the United States shall forego their lien of 1841, superior to that of the petitioners, as to the lands in Morgan county, and sell a part of the lands bound by their decree of 1846, out of that county, so that the petitioners may be paid in preference to the plaintiffs. This, it seems to me, can not be done. The United States are entitled to all their legal rights; and, in the case supposed, of an application to a court of equity, to say to the judgment creditors: We will enforce our lien of older date than yours, made specific by a levy before you applied to the court; we will retain our lien under the decree of 1846 upon the lands out of Morgan county; we are not to be regarded as ordinary individual creditors of the estate; your rights must yield to ours. The same answer to the application of the petitioners must be given in this court.

If they have a lien, so have the United States; and to decide that, under the circumstances of this case, the latter could not enforce their judgments of 1841, would be to say, in effect, they had no priority of payment at all, but they must stand upon an equal footing with the other creditors; to prevent which was the very object of that portion of the statutes of 1797 and 1799, already referred to.

We have been told their lien can not be displaced by that which is not a lien, the priority of the plaintiffs. It is not. There is not only a priority, but that priority has been perfected into specific liens. If it be said that, discarding the decree of 1846, the United States might be regarded as individuals and thrown on the lands out of Morgan county for the satisfaction of their judgments of 1841, and they ought, consequently, to be treated in the same manner, notwithstanding that decree; if the first could be done, the other would not necessarily follow, and the reason is, in the former case, the United States would be paid, in the latter not; and the law is imperative they shall be first paid when the estate of any deceased debtor, in the hands of executors or administrators, is insufficient to pay all the debts due from the deceased. And certainly the lands of the deceased debtor, when these petitioners made their application to this court, were as strongly bound by the claim of the United States, as the proceeds of them could have been in the hands of executors or administrators.

The laws of the United States giving a priority to the government are of general application, in the cases therein stated, and if a debtor is to be excepted out of the general rule, it devolves upon the party alleging the exception, to show it. I think these petitioners have not satisfactorily established their right to be withdrawn from the ordinary predicament of creditors, when they come in competition with the claims of the government. In all such cases, it is manifest Congress intended to give priority of payment to

the United States over all other creditors. *Blaston v. The Farmer's Bank of Delaware*, 12 Peters, 134.

Admitting that the question is not free from difficulty, yet I have not been able to come at any other conclusion than that which is here announced.

It is sometimes a hard rule, undoubtedly, upon individual creditors and upon families, that a man's whole estate should be swept away to pay a debt due to the government, but courts of justice can only expound and apply the law, and if upon a fair and impartial examination of the subject they can ascertain its intent and meaning, their duty is simply to administer it, as it becomes applicable, in the various relations of life, to the rights and interests of the parties before them.

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ABATEMENT.

Where there are three joint indorsers and the process is served on two of them, under the act of 1839, the suit may be prosecuted, and a plea in abatement will be overruled. *Cooper v. Gordon*, 6.

The pendency of a suit, in a state court, for the same cause, may be pleaded in abatement, to a suit in this court. *Earl v. Raymond*, 233.

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The same rule applies to the marshals and sheriffs. The first levy on personal property will have a prior lien. *Ib.*

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ACCESSORY.

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ACTION—Continued.

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AGENT.

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The intention of the party can not be shown to be different, from the written power. *Ib.*

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And if he shall take advantage of such act, to obtain a title in his own name, for the land, and by a subsequent procedure to perfect a title, he is responsible in the character he at first assumed, and will be held to answer to those in whom the title is vested. *Ib.*

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And the attachment being still pending, and also the proceeding against the garnishee, will be good ground for a plea in abatement, if an action be commenced against the promisers in any other State. *Ib.*

An attachment issued under a State law, which has not been adopted by act of Congress or rule of court can not be sustained. *Binns v. Williams*, 580

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It is perjury for a bankrupt, to omit to place items of property on his schedule which he swears to be correct. *United States v. Nichols*, 23.

Bank. Bill of Exchange and Promissory Notes. Bill in Chancery.

BANKRUPT LAW—Continued.

The sale and transfer of the partnership property, to one partner, to pay his separate debts, is opposed to the second section to the late bankrupt law, and is void under that law. *Collins v. Hood, Ass.*, 186.

BANK.

A note issued by a bank in violation of its charter is void. *Root v. Wallace*, 8.

It is also void if issued in contravention of a law in force at the date of its charter. *Ib.*

All who receive the notes of a bank are bound to take notice of its charter. *Ib.*

A bank which draws a bill in express violation of its charter can not set up such bill in payment. *Davis v. The Bank of the River Raisin*, 387.

The bill is void and must be so held in all transactions relating to it. *Ib.*

BILL OF EXCHANGE AND PROMISSORY NOTES.

A foreign bill of exchange must be regularly protested, after demand of payment and refusal. *Orr v. Lacy*, 243.

A bill or note for discount signed and indorsed in Michigan to be discounted in Indiana in a bank will be considered as negotiated there. *Orr v. Lacy*, 243.

A note dated on Sunday is illegal. *Stewart v. Morgan*, 563.

BILL IN CHANCERY.

A creditor's bill may be brought in the circuit court. *Snydam v. Beals*, 12.

In this mode property fraudulently concealed, or assigned may be reached. *Ib.*

On a bill in chancery the errors of a court at law can not be corrected. *Ib.*

A demurrer to the bill being overruled, a decree *pro confessio* may be taken against defendants who fail to answer. *Ib.*

A bill of discovery, to aid in a suit at law, should aver the materiality of the fact and that they can only be proved by the oath of the defendant. *Bell v. Pomroy*, 57.

It is no sufficient answer to such bill, that A. B., who is interested, can prove the facts. *Ib.*

The complainant can not be forced to rely upon an interested witness. *Ib.*

There is a distinction between a bill for discovery merely and one for discovery and relief. *Ib.*

On a bill to restrain the infringement of a copy right, the court will refer the case to a master to ascertain the extent of infringement, if any. *Executors of Story v. Derby et al.*, 160.

A bill being filed praying that a title may be decreed, and for an injunction against a recovery, etc., it was objected that the name of Hyde, the com-

Bill in Chancery. Bill of Review. Bills of Exchange. Bill of Lading.

BILL IN CHANCERY—Continued.

plainant, was not known in the proceedings. The court required the tenant in possession to be named as co-complainant. *Hyde v. Folger*, 255.
 A proceeding, under a statute, against real property is, in effect, a proceeding *in rem*, and can only affect the thing named in the bill. *Boswell v. Dickerson*, 262.

A decree for money on such a bill under which other lands have been sold: such sale is void. *Ib.*

Where a bill is filed for injunction to prevent the defendant from infringing a patent right, the defendant alleged a license, and the complainant averred the license had been abandoned—no such allegation being contained in the bill, no such proof could be received. *Wilson v. Stolley*, 275.

An accepted bill will not be considered in payment of an indorsed note unless there was an express contract that it should be so received. *Cooper v. Gibbs*, 396.

A bill of discovery was filed, calling upon the defendants to answer, whether a note given by them was not dated on Sunday. *Stewart v. Morgan*, 563.
 The defendants demurred as the answer might subject them to a penalty for breach of the Sabbath. *Ib.*

Court sustained the demurrer. *Ib.*

Also they sustained a demurrer to that part of the bill which required one of the defendants to answer whether he was not a lawyer and did not write the note. *Ib.*

A bill filed which complainant can not sustain will be dismissed with costs. *Barns v. O'Mally*, 576.

No grounds of equity, real or supposed, at the filing can authorize the court on its being dismissed to tax the costs to defendant. *Ib.*

BILL OF REVIEW.

Bill of review filed without leave for errors on the face of the decree. *Ketchum v. Farmers' Loan Company*, 1.

A bill of review will lie for newly discovered evidence, or for errors on the face of the decree. *Ross v. Prentiss*, 106.

BILLS OF EXCHANGE.

The cashier of a bank which deals in bills of exchange may accept or negotiate such bills as the agent of the bank. *Lafayette Bank v. Illinois Bank*, 208.

This is the usual custom. *Ib.*

BILL OF LADING.

Bills of lading, which required the signature of a principal agent, can not be held good if signed by a person designated by the agent. *Pendall et al v. Rench*, 259.

BILL OF LADING—Continued.

A bill of lading can not be contradicted by parol. But evidence may be given that the consignee had notice that the goods belonged to a person different from the person named in the bill; and that a corrected bill of lading was forwarded to the consignee. *Chapin v. Siger*, 378.

Instruction was given to the consignee not to sell the property, but to store it until it should command better prices. A sale contrary to instructions, except for advances, makes the consignee liable. *Ib.*

BOND.

In Indiana a bond is made assignable by statute. *Westcott v. Cole*, 79.

CHANCERY.

The general chancery powers of a court of the United States, are derived from the laws of the United States, and not the laws of the State. *Lanmon v. Clark*, 18.

But where a State creates a new remedy, appropriate to a chancery jurisdiction, relief will be given in the Circuit Court. *Ib.*

On this ground a creditor's bail is sustained. *Ib.*

Chancery will decree a specific execution of the contract in behalf of the vendor or vendee. *Bronson v. Cahill*, 19.

But to give effect to a contract there must be mutuality. *Ib.*

Where only a part of the vendors are bound there is a want of mutuality. *Ib.*

A debtor of a judgment debtor, if he agree to pay the judgment creditor, may be decreed to do so. *Sedam v. Williams*, 51.

A plea to a bill of discovery, to aid in a prosecution at law, can not set up that another individual, who is interested, knows the facts required to be answered. *Bell v. Pomroy*, 57.

To entitle a person to a specific execution of his contract, he should show that his part was performed at the time stipulated, or within a reasonable time afterward. *Mason v. Wallace*, 77.

But where the purchaser took possession of land, and made very valuable improvements, the court will presume an acquiescence by the vendor. *Ib.*

A court of equity may direct an equity to be sold, but in such case the extent of the right will be ascertained and made known. *Westcott v. Cole*, 79.

A joint answer is sufficient, all the defendants swearing to it. *Davis v. Davidson*, 136.

Answers to bills are generally drawn jointly and severally. *Ib.*

The answer must be signed by counsel. *Ib.*

If it be taken by Commissioners it need not be so signed. *Ib.*

Equity will not sustain an agreement between partners, if the firm be at

Coin. Collision. Common Carriers. Consideration.

CHANCERY—Continued.

the time insolvent, by which the whole property and effects of the firm are transferred to one member; the effect being to defeat the equitable preference of the firm creditors, and to give the separate creditors of the partner accepting such transfer, a preference to the creditors of the company. *Collins v. Hood, assignee*, 186.

If an amendatory answer repeat what was said in the answer filed before, without varying the defense, it will be considered as impertinent, and will be referred to a master, etc. *Gier v. Gregg*, 202.

Where a deed is defective, chancery will decree a conveyance on payment of the purchase money. *Murphy v. McVicker*, 252.

Chancery will set aside all conveyances tainted with fraud. *Odenheimer v. Hanson*, 437.

COINS.

Counterfeiting coins of the United States, or coins made current by the law of the United States, an offense. *United States v. Brown*, 142.

COLLISION.

If the plaintiff is in fault in a case of collision he can not recover damages. *Halderman v. Beckwith*, 286.

There can be no recovery where both parties are in fault. *Ib.*

The maritime rule apportions the damages, as the faults of the parties may be established. *Ib.*

What damages may be recovered from an offending boat. *Ib.*

In a case of collision the jury will give remuneration for raising the injured boat, repairing her, and for her use until the repairs shall be made. *Barrett v. Williamson*, 589.

The jury are not bound to give interest, but they will, if they find for the plaintiff, give such damages as they shall deem just. *Ib.*

COMMON CARRIERS.

Common carriers are responsible for property confided to them, except it be destroyed by the act of God or the public enemy. *Pendall v. Rench*, 259.

Any damage done to goods in the course of transportation must be made good by the company. *Ib.*

A part of the goods were not delivered—a part were delivered in a damaged state—held that the carriers were liable to the consignee. *Burritt v. Rench*, 325.

CONSIDERATION.

A partial failure of consideration can not be set up to a note given on the purchase. *Elminger v. Drew*, 388.

Constitutional Law. Consignee. Continuance. Consequential Damages, etc.

CONSTITUTIONAL LAW.

There are conflicting authorities on the subject; but the weight of authority is as above stated. *Ib.*

It was the doctrine of the Supreme Court when this case was decided. *Ib.* Since that time a different rule has been sanctioned by that court. *Ib.*

CONSIGNEE.

Where a consignee, having made no advances, sells the property contrary to his instruction, he is responsible. *Chapin v. Siger*, 378.

CONTINUANCE.

It is a ground to continue a cause in a criminal case that the jurors have not been legally summoned. *United States v. Woodruff*, 105.

A continuance will be granted when proper diligence has been used to procure a deposition material to the merits, is not received. *Marsh & Comp-ton v. Hulbert*, 364.

CONSEQUENTIAL DAMAGES.

In the use of his own property, a man must be careful not to injure his neighbors. *Beardsly v. Swann*, 333.

An excavation of the side-walk opposite his own house for a vault, being authorized, provided defendant kept it covered, but being left uncovered, the plaintiff at night fell into it, and was injured—held, the defendant was liable. *Ib.*

To sustain the action plaintiff must show that he used ordinary caution, and that the defendant was negligent. *Ib.*

In estimating the damages, the jury will consider the pain endured, time lost, and expense incurred. *Ib.*

A state has no power to regulate a commerce which extends beyond its jurisdiction. *Halderman v. Beckwith*, 286.

Where a commerce begins and ends in a State, the regulation of it belongs to the State. *Ib.*

The Louisiana law, which adopts many regulations in regard to the navigation of the Mississippi, can not control boats engaged in a commerce between Louisiana and other States. *Ib.*

Such a power exercised by the States, would be destruction to a general commercial intercourse between them. *Ib.*

The courts of the United States will follow the established construction of a statute of a State, or the constitution of a State, if it do not impair the obligation of a contract, nor conflict with the Constitution, or any law of Congress. *Nesmith v. Sheldon*, 375.

CONTRACT.

The party who asks a court of chancery to decree a specific execution of his

Contract. Copy Right.

CONTRACT—Continued.

contract, must show that he has performed at the time, or within a reasonable time afterwards. *Mason v. Wallace*, 77.

Where there has been an acquiescence in the vendor, under certain circumstances, it may be deemed an excuse of delay of payment. *Ib.*

Two notes having been given, signed by Ely & Hawes, payable to Walden, Thomas & Co., the notes were indorsed by them, and also by D. J. Ely, in blank. Afterward David J. Ely agreed with Walden, Thomas & Co., on the delivery of the above notes, to pay the amount as if he had indorsed the notes. Held, that he was liable, the surrender of the notes to him being a valuable consideration. *Dennes v. Ely*, 173.

The court can not change a contract under any emergency. *Valettie v. White Water Canal*, 192.

A contract to deliver three thousand hogs cleaned, at such time as should be required by the purchaser, not exceeding seven hundred in a day. On the failure of the plaintiff to deliver the number, the defendant might have put an end to the contract and refused to receive any more. *McNaughten v. Cassilly*, 530.

After the defendant's agent refused to receive any more hogs, there being one or two wagon loads at the door of the pork house, ready to be delivered, and a great number killed and cleaned, it was unnecessary to make a tender of the hogs. *Ib.*

If the jury are satisfied that the plaintiff had the hogs ready to be delivered a refusal to receive any more, was sufficient to charge the defendant. *Ib.*

The contract creates the law between the parties; and when one party contracts with another to do a certain thing, no excuse can be heard for the non-performance, except the act of obligee hindering the performance or dispensing with it. *Dwight v. Williams*, 581.

In such a case, insolvency is no excuse. *Ib.*

This, under the law, may excuse a suit where the debtor is insolvent, but there is no such condition expressed or implied in the contract. *Ib.*

COPY RIGHT.

A person who uses his own manuscripts for the purpose of instructing others, does not thereby abandon them to the public. *Bartlett v. Crittenden*, 300.

Nor does he abandon them when his pupils are permitted to take copies. *Ib.* Such copies being intended for instruction, as used, can be applied to no other purpose. *Ib.*

In the use, the intention of the owner of the manuscript can not be perverted or extended. *Ib.*

Every abridgment of a work, however fair, does more or less affect the sale of the work. *Story v. Holcomb*, 306.

 Copy Right. Counsel. Damages. Deceit.

COPY RIGHT—Continued.

The copy right of an author should be protected by the same rule that applies to a patented machine. *Ib.*

A fair abridgment contains the principal of the original work. A compiler or reviewer can not extract from an author so as to convey the same knowledge of the original book. *Ib.*

There is a clear distinction between a compilation and an abridgment. An abridgment necessarily adopts the same arrangement, and conveys the same knowledge in a condensed form. *Ib.*

A compiler can neither adopt the arrangement, nor convey by his extracts the same knowledge. *Ib.*

A fair abridgment, though it injure the sale of the original book, is lawful. *Ib.*

The intent with which extracts are made can be of little or no importance. *Ib.*

A part of a book may be an infringement, and the other parts not. *Ib.*

COUNSEL.

Counsel has power to enter into a stipulation in a suit wherein he is employed. *Farmers' Trust v. Ketchum*, 120.

And there being no unfairness or impropriety imputed, the court will not set aside the agreement. *Ib.*

DAMAGES.

Where a purchaser refuses to take a part of the hogs purchased by his contract, he will be liable. *McNaughten v. Cassilly*, 530.

The damages will be the difference between the price agreed to be paid and the price for which the hogs would sell. *Ib.*

Congress having acted upon a claim for damages, done on the farm of the defendant, from its occupancy by the troops of the United States, it is final. *U. States v. Williams*, 567.

If a fugitive from labor is enticed away or rescued, it is an injury done to property. *Jones v. Vansandt*, 599.

The damages are measured by the extent of the injury. *Ib.*

DECEIT.

An action of deceit lies against a warehouse man, who gives a false receipt, by means of which the plaintiff is induced to accept and pay a draft for \$12,000. *Snydam v. Watts*, 162.

The plaintiffs made an advance, as commission merchants, expecting to have the selling of the produce, and their commissions; held, that this was a ground for damages. *Ib.*

The defendant is also liable for the fraud. *Ib.*

 Declaration. Deeds. Dedication to Public Use.

DECLARATION.

An averment in the declaration that the defendant has made the thing "in imitation of the patent," is sufficient to sustain the action. *Parker v. Haworth*, 370.

To show a violation of the patent, the declaration need only aver that the defendant has constructed, used, and sold to others the thing patented. *Case v. Redfield*, 370.

DEEDS.

The surrender and cancellation of a deed does not reinvest the title. *Suydam v. Beals*, 12.

A deed of general warranty may be good, although it may not contain technically the five usual covenants. *Bronson v. Cahill*, 19.

In Illinois, a deed takes effect from the time it is left for record. *Ross v. Prentiss*, 106.

A deed executed in any other State in pursuance of the laws thereof, is a valid conveyance of land in Michigan. *Root v. Brotherson*, 230.

Each State has the right to regulate the transmission of real estate within it by deed or by operation of law. *Ib.*

The deed being executed in New York, the grantors will be presumed to be citizens of that State. *Ib.*

But this is not made a condition by the statute of Michigan. *Ib.*

A deed is defective, being executed under a defective power. *Murphy v. McVicker*, 252.

A deed executed for land, which is held adversely to the grantor, by an individual in possession, is void, in Illinois, under the Champerty act. *Dubois v. McLean*, 486.

DEDICATION TO PUBLIC USE.

By certain statutes, provision is made for establishing seats of justice in Indiana. *Sargeant's heirs v. State Bank*, 339.

Commissioners were appointed, and other officers, who were to receive donations of land, or purchase the same, etc. *Ib.*

In establishing the seat of justice for Tippecanoe county, certain proceedings were had under the law, and a bond was taken from Samuel Sargeant to the Board of Justices of "Tippecanoe county" to convey to them, when they should be organized, certain lots for public purposes. *Ib.*

The seat of justice being established at Lafayette, in a summary mode provided suit was brought against the heirs of Sargeant, for a title to the property which their ancestor agreed to convey. A decree of conveyance was entered, and the conveyance in pursuance thereof was executed. *Ib.*

The property thus conveyed has become very valuable, and the heirs have

DEDICATION TO PUBLIC USE—*Continued*

- brought an ejectment to recover it, on the ground that the proceedings were illegal and void. *Ib.*
- The bond, though it bound the obligor to convey to a board not in *esse*, is not void or inoperative. *Ib.*
- It is fairly within the statute. *Ib.*
- The court making the decree, held, that notice was given to the heirs, and that is conclusive in the case. The fact of notice can not be collaterally denied. *Ib.*
- But the dedication is good at common law, if the statute has not been technically complied with. *Ib.*
- And after the lapse of many years enjoyed by the public, the title must be held good. *Ib.*

DEPOSITION.

- A judge of a court, having a right to administer oaths, may administer them in any county in the state. *Voce v. Lawrence*, 203.
- He certifies that a deposition was taken before him. Now a deposition is not properly so called, which is not signed by the deponent. The signature of the deponent being on the deposition, it was not essential that the judge should certify the fact more particularly, as to the signature, than that the deposition was taken before him and written by him. *Ib.*
- A mistake in the name of the plaintiff or defendant, "aforesaid," referring to him, plaintiff or defendant, the name being truly stated in the title of the cause, is no ground for rejecting the deposition. *Ib.*
- The distance as proved, is more than one hundred miles from the place of taking the deposition to the place of trial. *Ib.*
- The law requires a deposition taken under the act of Congress to be retained by the officer until he delivers the same into court, or shall, together with a certificate of the reasons for taking it, be by him sealed and directed to the court. *Shankwiler v. Reading*, 240.
- A deposition not so put up and directed, will be rejected. *Ib.*

DOWER.

- Dower is a clear legal right and can not be divested except upon full knowledge of the widow's rights. *United States v. Duncan*, 99.
- If she accept what by the will is given in lieu of dower, not knowing the extent of the estate, she may renounce under the will and claim, after the lapse of years. *Ib.*
- In some cases she may bring suit to ascertain the extent of her right. *Ib.*
- The statute of Illinois, declaring that any provision in the will bars dower, must have a reasonable construction. *Ib.*
- To bar dower, the amount must afford a reasonable presumption it was given in lieu of dower. *Ib.*

EJECTMENT.

This action, by statute of Michigan if no tenant in possession, may be brought against any one exercising acts of ownership over the premises. *Hyde v. Folger*, 255.

ENTRY.

An entry of land within the Virginia military district of Ohio, and a survey of the same, before the extinguishment of the Indian title, is made void by certain acts of Congress. *Chinn v. Darnell*, 440.

A person having such a claim is entitled, having a patent, to compensation for his improvements, etc. *Ib.*

EQUITY.

See Chancery.

EVIDENCE.

A void note indorsed can not be given in evidence, by the indorsee against the indorser to prove the consideration. *Root v. Wallace*, 8.

In such case a recovery may be had by showing the consideration paid. *Ib.*

The contents of such note is not evidence. *Ib.*

Unless the averment of citizenship in the declaration or bill, be contradicted by plea it need not be proved. *Hilliard v. Brevoort*, 24.

A note in the hands of the indorsee is *prima facie* evidence of the consideration paid. *Martin v. Kercheval*, 117.

But the indorser in an action by the indorsee may show what was paid. *Ib.*

If the payee of the note gave no consideration, and the indorsee paid none, the fact may be shown. *Ib.*

A transcript from the county auditor essentially differing from the record can not be received as evidence. *Ib.*

To make a sworn copy evidence, the witness must state that he compared the copy with the original. *Catlin v. Underwood*, 199.

A surrogate acts as a clerk in certifying the proceedings, and as he also acts in the capacity of judge, he must certify as to the authentication under the act of Congress. *Ib.*

In chancery as at law, the foundation for the evidence must be laid in the pleading. *Wilson v. Stelly*, 375.

To admit proof of the contents of a deed the original must be proved to have been lost or destroyed. *Randsdale v. Grove*, 282.

A deed may be presumed, from a long possession and under circumstances favorable to such a presumption. *Ib.*

Such presumption can only be drawn, when it would seem naturally to arise from the facts in the case. *Ib.*

Evidence. Exchange.

EVIDENCE—Continued.

When no interest has been paid on a mortgage for twenty years, presumption of payment may arise. *Ib.*

Where a purchase has been made of one who has no title, it would be difficult to presume a title from a stranger. *Ib.*

On an issue of partnership, an offer to pay the partnership note, if the holder would take property, is evidence. And also that the defendant said the note was signed by his partner. *Thomas v. Wolcott et al.*, 165.

A patent offered in evidence was objected to because it appeared the name of the patentee appears to have been altered by scratching out a dot over the letter i, which made the name of Bogardus instead of Bogardies, as it now appears. Objection overruled. *Morgan v. Curtenius*, 366.

The copy of a will was objected to because it was not certified under the seal of the probate court. The judge certified he had no seal, the certificate under the law is good without a seal. The copy admitted. *Ib.*, 367.

A deed by the executrix to Cole for the land in controversy, and also a deed from Cole to Frink for one-third of the fraction, dated 1846, deed from Frink to Morgan the plaintiff for one-half of the 33½ acres. It was objected—that the conveyance was made to Morgan, a citizen of another state to give jurisdiction to this court. But there being no appearance of an intention to commit a fraud on the jurisdiction of the court, objections overruled. *Ib.*

An outstanding title was attempted to be proved, by offering a deed—but the person who took the acknowledgment did not state that the person was known to him. On this ground deed rejected. *Ib.*

Parol evidence was then called to prove the signature of the grantor—objected to until after proof of hand writing was made—objection overruled. *Ib.*

After the emanation of the patent on a pre-emption claim, no proof of the assignments of the rights previously, can be admitted. *Ib.*

A letter press copy made at the same time can not be received as an original paper. *Chapin v. Siger*, 378.

A certified copy of a letter of the auditor is evidence. *Raymond v. Longworth*, 481.

A judgment against the principal is *prima facie* evidence against the security. *Berger v. Williams*, 577.

The security may show fraud or collusion, that the debt has been paid, or that there was a mistake in entering the judgment. *Ib.*

EXCHANGE.

Where a note is given in Indiana payable in New York, with interest, and the rate of exchange, the rate of exchange will be, the time the note becomes due. *Price v. Teal*, 201.

EXCHANGE—*Continued.*

A creditor in New York, has a right to require payment in par funds. *Howe v. Wade*, 319.

EXECUTIONS.

The return of an execution *nulla bona*, is sufficient to sustain a creditor's bill—though the officer does not state that he searched for property. *Swydam v. Beale*, 12.

An alias execution can not issue until the return of the first execution. *Corning v. Horner*, 133.

If such an execution be lost—court would order an alias. *Ib.*

When a levy on personal property is made, the judgment is presumed to be satisfied. *Ib.*

No alias can issue under such circumstances. *Ib.*

But if the property be sold for less than the judgment, an alias may be issued. *Ib.*

A levy by execution, should describe the property, so as to distinguish it from all other property. *Gault v. Woodbridge*, 329.

Short of this there can not, it would seem, be notice to a subsequent purchaser, *Ib.*

Parol evidence, after conflicting rights have grown up, can not be received to make the levy certain, which before was wholly uncertain. *Ib.*

A levy on one-half of a lot, without designating which half, or of one hundred acres in a section, is too indefinite to convey the title. *Ib.*

A defective levy being set aside, on motion, makes good a junior levy under the laws of Ohio. *Ib.*

EXECUTORS.

A law authorizing executors to sell so much land of the estate as shall be necessary to pay its debts, is held by the Supreme Court of Illinois to be unconstitutional. *Dubois v. McLean*.

In the case the law passed March, 1819, the sale was made in 1823. *Ib.*

Sale void under statute of limitations. *Ib.*

The debt for which the land was sold contracted after the law. *Ib.*

FRAUD.

In Illinois, all conveyances to postpone or defeat creditors are void. *Ross v. Prentiss*, 106.

A security on a postmaster's bond, after the defalcation, was held to be a creditor; and the conveyance was, consequently, void. *Ib.*

To rescind a contract on account of fraud an offer must be made to return the thing purchased. *Murphy v. McVicker*, 252.

The vendor must be placed by the vendee, as he stood before the purchase. *Ib.*

Fugitives from Labor. Guarantor. Guardian. Garnishee.

FRAUDS—Continued.

Whatever subterfuges may be resorted to, to defeat the claims of creditors, a court of chancery will reach the property covered. *Odenheimer v. Hanson*, 437.

*As between the individuals who have concocted the fraud chancery will not interfere. *Ib.*

Circumstances are sometimes strong enough to stamp the transaction with fraud, although against the oaths of the parties concerned. *Ib.*

FUGITIVES FROM LABOR.

See Slaves.

GUARANTOR.

Where a debt guarantied is not paid, notice to the guarantor must be given in a reasonable time. *Dunbar v. Brown*, 166.

The same strictness is not required in such a case, as to charge the indorser of a bill or promissory note. *Ib.*

Nothing can excuse the want of notice but the insolvency of the debtor. *Ib.*

A guaranty to pay any balance that could not be collected on a certain bond and mortgage, after due course of law—held that any and every course of law, necessary to reach the property of the obligor was a condition precedent to the liability of the grantor. *Dwight v. Williams*, 581.

To charge the guarantor, suit in a reasonable time was essential, and the prosecution of it with ordinary diligence. *Ib.*

A failure to use this diligence releases the guarantor. *Ib.*

GUARDIAN.

The Court of Common Pleas have the power to appoint guardians, and also guardians *ad litem*. *Sprague v. Lüherberry*, 442.

A guardian may waive process, and enter his appearance for his wards. *Ib.*

Temporary absence from the county does not affect the jurisdiction of the court, in the appointment of a guardian. *Ib.*

The domicile of the infant is always presumed to be that of its mother. *Ib.*

The place where its parents lived and died, and its property remains, is presumed to be the proper place for the court to make the appointment. *Ib.*

GARNISHEE.

A garnishee summoned who owes a sum of money, for which his note was given to the absent or absconding debtor, creates a lien in his hands to the amount of the sum due, and the promisee can not afterward assign such note. *Hacker v. Stevens*, 535.

From the time the garnishee was summoned, he is amenable to the process, and liable to pay the debt to the plaintiff in the attachment. *Ib.*

HEIRS.

A personal decree will be made against the heir for an annuity charged on the land. *Latimer v. Moore*, 110.

INDICTMENT.

Where words of description in an indictment can apply only to the proper person, it is sufficient, though the words of the statute be not used. *United States v. Deming*, 3.

On a charge of perjury against a petitioner in bankruptcy, the indictment need not set out the petition. *Ib.*

A general reference to the petition, which shall show its character and object, is sufficient. *Ib.*

To sustain an indictment for perjury the oath must be administered by some one authorized. *Ib.*

An authority to a clerk, to swear petitioners resident in a county, must be limited to such. *Ib.*

An indictment for perjury should charge the oath to have been false, and known to be so by defendant, and that it was done with a corrupt motive. *United States v. Babcock*, 113.

INDIANS.

Indians living within a State, and doing business as merchants, are responsible under the laws of the State, for the payment of debts. *Leury v. Weaver*, 82.

This presupposes that they are not under the laws of the United States. *Ib.*

Land reserved to them under a treaty, which vests in them the title, but which restricts them from conveying it, descend under the laws of the State, and may be made responsible for the payment of debts. *Ib.*

The reservation as to the conveyance is personal, but the lands in the hands of heirs is responsible for debts. *Ib.*

The law substitutes an agency which conveys the land without the sanction of the President. *Ib.*

INDORSER AND INDORSEE.

Where there are three joint indorsers, and the process is served on two of them, under the act of 1839, the suit may be prosecuted against the two. *Cooper v. Gordon*, 6.

The indorsement on a void note is not evidence of the consideration paid by the indorsee to the indorser. *Root v. Wallace*, 8.

In a suit against the indorser by the indorsee, who received it in payment of a pre-existing debt, the indorser can not set up in defense that he was an accommodation indorser. *Varnum v. Bellamy*, 87.

Indorser and Indorsee. Injunction. Judicial Proceedings.

INDORSER AND INDORSEE—*Continued.*

Forbearance to sue the makers of a note will not release the indorser. *Ib.*
A note in the hands of an indorsee is *prima facie* evidence of the consideration paid. *Martin v. Kercheval*, 117.

But the assignor may prove the amount paid. *Ib.*

Except on bills of exchange, an indorsee can not sue in the Circuit Court unless the indorser could have sued in the same court. *Assignee of Brainard v. Williams*, 122.

When notes or bills are sent for collection, they are generally indorsed in blank, the holder to fill up to himself. *Orr v. Lacy*, 243.

Under this, he may bring a suit in his own name. *Ib.*

If time be given for payment to the drawer of a bill or note, the indorser is discharged. *Cooper v. Gibbs*, 396.

A *bona fide* holder of a negotiable note, indorsed before maturity, holds it free from any claim by the maker against the payee. If indorsed after maturity the indorsee takes it at his risk. *Fossett v. Bell*, 427.

L. being insolvent, and the debtor of F. & Co., without their knowledge procures and indorses the note of B. his debtor, and places it in the hands of G. to be held for the benefit of F. & Co., and G. holds it in his hands till it is past due, and then delivers it to F. & Co.—held that B. can not, in a suit by F. & Co. on this note, set off the note of L. to H. indorsed by H. to B. after the maturity of the note held by F. & Co. *Fossett v. Bell*, 427.

In the absence of all circumstances warranting a presumption of fraud, the indorsement of F. & Co. takes effect from its actual date, and not from the time of its delivery to F. & Co. *Ib.*

INJUNCTION.

Before the right under a patent is established at law, chancery will not decree an injunction, unless such right shall be clearly established. *Brooks v. Bicknell*, 70.

Before granting an injunction on an infringement of copy right, the court will, generally, refer the matter to a master, with instructions to report the extent of the infringement, if any, that the court may act upon the case. *Executors of Story v. Derby et al.*, 160.

Notice must be given of an application for an injunction. *Wilson v. Stolley*, 273.

Affidavits will be received in behalf of both parties. *Ib.*

Answer also may be filed. *Ib.*

JUDICIAL PROCEEDINGS.

Where from the record it appears that the defendant appeared in the action, that fact can not be denied by plea or otherwise. *Thompson v. Emmert*, 96.

 Judicial Proceedings. Judicial Sales. Judgment.

JUDICIAL PROCEEDINGS—*Continued.*

As well might there be a denial of a judgment. *Ib.*

If an attorney, without authority, and by mistake, entered an appearance of a defendant, he would not be bound by it. *Ib.*

JUDICIAL SALES.

As a general thing money paid on judicial sales, can not be recovered back. *United States v. Duncan*, 607.

The purchaser incurs the risk as to the title in the absence of fraud. *Ib.*

JUDGMENT.

A judgment in Indiana against executors, does not authorize an execution against the lands of the deceased. *O'Brien v. Woody*, 75.

A sale of land under such a judgment, can convey no title. *Ib.*

A judgment being assigned of five thousand dollars to pay a debt of much smaller amount, the court directed the first proceeds of an execution on the judgment to be paid, in discharge of the debt. *Varnum & Co. v. Milford*, 93.

A person purchasing lands on an execution on the above judgment, will be required to pay the money to the assignee of the judgment. *Ib.*

A judgment is a nullity, where it appears there has been no notice to the defendant. *Thompson v. Emmert*, 96.

A judgment on an attachment, being a proceeding *in rem*, is no ground for an action out of the State. *Ib.*

An irregular judgment may be set aside, on motion. *Spafford v. Ritten*, 253.

A judgment can not be set aside on motion, after the term at which it was entered. *Wood, Grant & Wood v. Luse & Niles*, 254.

In New York it is otherwise. *Ib.*

But it can not be set aside by the common law. *Ib.*

Where a judgment is appealed from the common pleas to the supreme court, the judgment remains a lien on the real estate of the defendant, in the county, and it would seem that the accruing interest, costs and penalty ought also to be considered as an incident to that judgment. *McLean v. L. Bank*, 430.

A mortgagor is not responsible, without notice, for the application of any surplus which may remain on the sale of the mortgaged property, after satisfying his mortgage. *Ib.*

Under the law of Indiana, on all judgments there is a lien on the lands of the defendant ten years. *Rockhill v. Hanna*, 554.

Judgments entered on the same day create equal liens, and the issuing of an execution on any one of them, does not affect the lien on the others. *Ib.*

The land of the defendant being sold, a *pro rata* distribution of the proceeds should be made in satisfaction of the judgments. *Ib.*

Judgment. Jurisdiction.

JUDGMENT—Continued.

The diligence of the plaintiff can not give him an advantage over the others. *Ib.*

A sale on one mortgage of the same date as others, the others not being made parties, can not affect their liens. *Ib.*

The sale will be considered as subject, to the same extent, to the other mortgages. *Ib.*

A judgment against the principal is *prima facie* evidence against the security. *Berger v. Williams*, 577.

In 1841, the United States recovered judgments in this court; subsequently in 1841-2, judgments were recovered in a State court against the same defendant. And in 1846, U. States obtained a decree against the defendant for a large sum. The whole property of defendant was not sufficient to the demand of the U. States; held, that prior lien of the U. States must first be paid. *Ib.*

JURISDICTION.

The court have no jurisdiction of a case where the complainant and one of the defendants are citizens of the same State. *Ketchum and Wife v Farmers' Loan and Trust Co.*, 1.

In such a case consent can not give jurisdiction. *Ib.*

To give jurisdiction, the stockholders of a bank need not to be stated as citizens. But the place where the bank does its business. *Ib.*

The citizenship of a person not served with process, must appear in the declaration. *Bargh v. Page*, 10.

Want of an averment of citizenship, or if made falsely should be taken advantage of by pleading. *Carroll v. Perry*, 25.

Unless such averment be contradicted it need not be tried. *Ib.*

The judiciary of the United States can not exercise a revisory power over State officers in the performance of their duties. *Carroll v. Perry*, 26.

But if their acts be illegal there is a remedy in the courts of the Union as well as in the courts of the State. *Ib.*

As a creditor's bill is merely the continuation of the suit at law, by reaching the fruits of the judgment, and can not be considered an original proceeding, the jurisdiction may be maintained if the complainant has changed his residence to the State where the bill is filed. *Hatch v. Dorr*, 112.

The eleventh section of the judiciary act of 1789 provides that an assignee, except on bills of exchange shall not sue in the courts of the United States, unless the assignor could sue in such court. *Assignee of Brainard v. Williams*, 122.

This is a restriction on the provision of the constitution, which declares that the court shall have jurisdiction between citizens of different States. And yet this provision has been sustained by the Supreme Court. The

 Jurisdiction. Jury. Label or Mark Used Fraudulently.

JURISDICTION—Continued.

law, it would seem can not abridge the rights given by the constitution. *Ib.*

Jurisdiction is exercised by the Supreme Court, under the constitution without statutory provision, as between States. *Ib.*

A fraudulent assignment to give jurisdiction could be prohibited. *Ib.*

The circuit court takes jurisdiction for and against a corporation from the place where its business is done. *Vallette v. White Water Canal*, 192.

The citizenship of persons, not necessary parties, and who may not apply to be made parties, need not be named in the bill. *Ib.*

The rights of persons not made parties are not affected by the proceeding. *Ib.*

A suit being brought on a note against Bennet and Ford, alleged to be citizens of Michigan, process served on Bennet, plea that Ford was a citizen of New York—demurrer to plea—which was sustained. *Doremus v. Bennet and Ford*, 224.

A note assigned by a bank in Michigan, to a citizen in another State, to give jurisdiction to this court, can not be prosecuted in this note. *Wells v. Newberry*, 226.

The bank, the assignor could not sue, consequently under decisions the assignee could not sue in this court. *Ib.*

A prior jurisdiction of the same cause of action, will abate a suit, if so pleaded, in this court. *Earl v. Raymond*, 233.

A company incorporated by a law of Indiana, and also a law of Illinois, to improve the navigation of the Wabash, which constitutes, to some extent, the boundary between the two States, the general place of meeting of the directors to do business being in Indiana, the records being kept there, suit may be brought by or against the corporation in that State. *Culbertson v. The Wabash Navigation Company*. 544.

A person may reside in one State and be a citizen in another. *Evans v. Davenport*, 574.

An averment of residence is not sufficient. *Ib.*

JURY.

In a criminal case it is good ground for a continuance, that the jurors have not been summoned as the law requires. *United States v. Woodruff*, 105.

The jury are the exclusive judges of the credibility of witnesses. *United States v. James Brown*, 142.

To authorize a verdict of guilty the evidence must be satisfactory. *Ib.*

The evidence to authorize a verdict of guilty, must produce a reasonable conviction on the minds of the jury, of the guilt of the defendant. *Ib.*

LABEL OR MARK USED FRAUDULENTLY.

Where a label or mark of another is used by an individual, with a fraudulent

Lapse of Time. Lease. License. Lien.

LABEL OR MARK USED FRAUDULENTLY—Continued.

Intent to recommend an article similar in appearance to one favorably known in the market, an injunction will be allowed. *Coffeen v. Brunton*, 516.

In commercial transaction good faith is required, and where a deception is attempted to be practiced, by recommending a spurious article as genuine, to the injury of any one, chancery will restrain the aggressor. *Ib.*

In such a case at law, nominal damages will be given where no specific injury has been proved. *Ib.*

In such case, the inquiry is, whether the label or mark is so assimilated to the label or mark of the complainant as to deceive purchasers. *Ib.*

And it seems not to be essential that there should be a fraudulent intent proved. *Ib.*

This principle as well applies for the protection of foreigners as citizens. *Ib.*

LAPSE OF TIME.

A reasonable time only can be allowed a vendor to execute his contract. *Bronson v. Cakill*, 19.

After the lapse of twenty-three years, when a great change has taken place in the value of property, courts require clear ground to set aside the proceedings from which titles emanated. *Sprague v. Lithberry*, 442.

Parol proof, after so great a lapse of time, not admissible to show that the minors were residents of Clermont county, and not of Hamilton. *Ib.*

We can not have before us the same evidence that was before the common pleas, when the guardian was appointed. *Ib.*

Every presumption is in favor of the proceedings of a court having a general jurisdiction. *Ib.*

No presumption of payment from lapse of time can be raised against the government. *U. States v. Williams*, 567.

No latches are imputable to the government. *Ib.*

LEASE.

A person having occupied a certain tenement under a written lease, at a certain rent, remained in possession sometime after the expiration of the lease; held, that he was bound to pay the same rent as under the written lease. *Parker v. Root*, 572.

LICENSE.

When one licensed to run a patented machine, sells such machine, the license does not necessarily pass. *Wilson v. Stalley*, 275.

LIEN.

A complainant may consent to the postponement of his lien in whole or in

 Limitations, Statute of. Manuscripts.

LIEN—*Continued.*

part, on conditions beneficial to all the parties concerned. *Valette v. White Water Canal Company*, 192.

Where there are two liens on the same lands, one being paramount to the other, which also covers other lands in the State, the court will order the lands to be sold, reserving the application of the proceeds, for the order of the court. *U. States v. Duncan*, 207.

Judgments and decrees in the circuit court, constitute a lien throughout the State. *Ib.*, 607.

A party who has a lien on two funds against his debtor, and another creditor of the same defendant has a lien on one of the funds, the one who has the two liens will be required to sell the property first, on which there is a single lien, before the property liable to both liens shall be sold. *Ib.*

But this rule can not affect a lien of the U. States. *Ib.*

The lien of the U. States does not affect a prior judgment lien, by mortgage or judgment. *Ib.*

The liens of the United States are of general obligation. If a debtor be excepted, the fact must be averred. *Ib.*

LIMITATIONS, STATUTE OF.

A deed made on a sale for taxes, which is void upon its face, can not be set up under the statute of limitations. *Moore v. Brown*, 211.

If from the deed it appears the legal notice was not given, the deed is void. *Ib.*

Where the statute of limitations has run against a judgment, it may be pleaded to a *sci. fa.* to revive the judgment. *Simpson v. Lasselle*, 352.

The statute of limitations runs only against the legal title. *Dubois v. McLean*, 486.

Under the limitation law of Illinois of 1835, two things are necessary to the defense: first, possession, and second, a connected title in law or equity deducible of record, etc. *Arrowsmith v. Burlingame*, 489.

The statute of Illinois of 1838-9, to quiet possession and confirm titles to land, is not a limitation law. *Ib.*

The statute of limitations is the law of the forum. *Jones v. Hays*, 521.

The statute of limitations does not run in behalf of an equitable title *Baird v. Wolfe*, 549.

MANUSCRIPTS.

By the common law, a party had a property in his own manuscripts. And if they be in possession of another person who is about to make an improper use of them, a court of chancery would inhibit such use. *Bartlett v. Crittenden*, 300.

 Marshal. Mortgage.

MANUSCRIPTS—Continued.

The principle in regard to a manuscript may be applied to the invention of a machine. *Ib.*

It belongs to the inventor, until he shall abandon it or give it to the public. *Ib.*

A person who uses his manuscript for the purpose of instruction, does not thereby abandon it to the public. *Ib.*

Nor does he abandon it when his pupils are permitted to take copies. *Ib.*

Such copies being intended for the purpose of instruction, can be applied to no other purpose. *Ib.*

The use intended can not be perverted. *Ib.*

MARSHAL.

If the marshal pay his deputies for taking the census out of his own funds, the government failing to advance the funds, and such payment being made to the government, which afterward paid the deputies, who had been paid, the marshal may set up such payment in a suit brought by the government. *United States v. Ten Eyk*, 119.

An officer is liable for mal-feasance, where he disposes of the property to the injury of the defendant, without complying with the requirements of the law. *Corning v. Burdick*, 133.

The officer will always be presumed to have done his duty. *Ib.*

A prior levy by a sheriff on personal property, will have a preference to a subsequent levy by a marshal. *Earl v. Raymond*, 233.

A judgment against one of the partners of a firm, will authorize the sheriff or marshal to levy on the interest in the goods of the judgment debtor. *U. States v. Williams*, 236.

Where there has been no unfairness, the court will not set aside a marshal's sale for inadequacy of price. *West v. Davis*, 241.

The service of a summons by a deputy marshal, the day after the new marshal has filed his bond and taken the oath, the process having before been in the hands of the deputy, is good. *Stewart v. Hamilton*, 534.

But this does not apply to the service of an execution. "If the marshal die, is removed from office, or his commission expires," he has no power to sell, if he has made a levy, but another execution must be issued to his successor. *Ib.*

MORTGAGE.

A mortgage can not be split up into different suits, on the different tracts of land mortgaged, yet, if one or more of such tracts have been sold or are held by a prior mortgage, such tracts may be omitted in the bill. *Sedam v. Williams*, 51.

Mortgage. Motion. Notary. Notice.

MORTGAGE—Continued.

The mortgage may remove that which is not a fixture, and which was placed or constructed on the ground after the mortgage was executed. *Cope v. Romeyne*, 384.

This is especially the case where the purchaser had no notice. *Id.*

Where a mortgage is given on land and personal property, and other liens are set up to the personal property, the court will direct the real estate to be first sold. But if it should be insufficient to discharge the mortgage, the lien on the personal property will be enforced, it being prior to the others. *McLean, assignee v. Lafayette Bank*, 430.

MOTION.

An illegal arrest will be set aside on motion. *Lyell v. Goodwin*, 29.

A judgment will be set aside on motion, if rendered under a power of attorney before the obligation becomes due. *Smith v. Hartwell*, 206.

On motion, the damages laid in the declaration were increased. *Gregg v. Gier*, 208.

A motion made at one term, but not decided at that term, nor continued to the next one, the court will order a continuance *nunc pro tunc*. *Hurd v. Williams*, 239.

But as the other party had a right to suppose, as the motion was not continued, it was abandoned, it will be continued to the next term. *Id.*

The court will not set aside a marshal's sale where there has been no unfairness, for inadequacy of price. *West v. Davis*, 241.

A judgment will not be set aside on motion, after the term at which it was entered. *Wood v. Luse*, 254.

A default will not be opened on motion, unless accompanied by a plea, sworn to under the rule of court, denying the signature. *Jenks v. Garretson*, 258.

NOTARY.

The seal of a notary may be made by an impression of the seal on the paper. *Orr v. Lacy*, 243.

His seal is recognized in all countries where the law merchant prevails. *Id.*

A seal is not required by the civil law. *Id.*

NOTICE.

A notice to the agent, is a notice to the principal. *Vernum & Co v. Milford*, 93.

Where a note is taken, the proceeds to be applied to the payment of a debt, a failure to demand payment and give notice, will make the note his own, by the holder. *Id.*

Notice. Occupying Claimant Law. Oath. Offset. Oyer.

NOTICE—Continued.

The holder will be excused from giving notice, where the drawer had no effects in the hands of the acceptor. *Ib.*

But this will be no excuse for a failure to give notice to the indorser. *Ib.*

Where a note is guaranteed and not paid, notice must be given to the guarantor in a reasonable time. *Dunbar v. Brown*, 166.

Nothing can excuse a want of notice, but the insolvency of the debtor. *Ib.*

Where evidence as to notice has been given to an indorser, the court will refer the matter to the jury, stating the law. *Orr v. Lacy*, 243.

Reasonable notice will be required to be given of an application for an injunction. *Wilson v. Stolley*, 272.

Notice to an indorser is sufficient, if it describe the note or bill, so that the indorser must know it and state that payment was demanded and protest made, and that the holders look to the indorser for payment. *Cooper v. Gibbs*, 396.

A notice to take depositions is not good, if served on counsel, who could not attend to the taking of the deposition, without being absent at the beginning of the court. *Bell v. Nimmon*, 539.

During court, a service of notice on, is not good, if objected to. *Ib.*

OCCUPYING, CLAIMANT LAW.

An individual who claims under a person who has no title, can not claim compensation for his improvements. *Reynolds v. Cordery*, 159.

OATH.

A clerk of a county authorized to administer an oath to petitioners in bankruptcy in the county, can not swear those who live out of the county. *United States v. Deming*, 3.

A deputy clerk being authorized to act as the principal, has power to administer oaths in bankruptcy. *United States v. Nichols*, 23.

Such oaths are presumed to be administered in the presence of the court, and under their authority. *Ib.*

OFFSET.

Payments by the marshal made in good faith, for taking the census, is a good set off in a suit brought against him by the government *United States v. Ten Eyk*, 119.

OYER.

The plaintiff is not bound to give oyer of an instrument of which he is not in possession, and which is as accessible to the defendant as to the plaintiff. *Rockhill v. Hanna*, 200.

PARTIES.

Citizenship must be alleged in the declaration, but it is never necessary to state that fact in a collateral proceeding. *Cooper v. Dangler*, 256.

PARTNERS.

A partnership in selling and purchasing land is governed by the same principles as ordinary partnerships. *Alcot v. Wing*, 15.

One partner advanced the funds, the other to do the business, the advance to be paid out of the proceeds of sale—profits or loss to be divided. Land on hand court directed to be sold, and the proceeds applied as the contract required. *Ib.*

When a judgment is obtained against one of two partners on a joint promise, the contract is merged in the judgment, and no action can be brought on the note. *Sedam v. Williams*, 51.

When a partner sells to another partner, who agrees to pay the debts of the firm out of the proceeds of the goods, he becomes a trustee. *Ib.*

A partner having sold his interest in the concern to his co-partner, who gave a bond and security to relieve his late partner from the debts of the firm, and to pay them out of his own property, is not an obligation merely to indemnify, but to pay the debts. *Assignee of Ruckey v. Spencer*, 168.

An obligation to indemnify, affords no ground for an action, until the party shall be damnified. *Ib.*

If the outgoing partner be discharged under the bankrupt law, he may, notwithstanding, enforce the payment of the partnership debts. *Ib.*

The creditors, for whose benefit obligation was entered into, may also enforce it. *Ib.*

The provisions of the 14th section of the late bankrupt law, directing the mode of settlement and distribution of estates, in bankruptcy, in cases of partnerships, are in affirmance of the principles on which courts of equity proceed in the adjustment of the rights of a creditor of a firm, and the separate creditors of each partner. *Collins v. Hood Assignee*, 186.

The creditors of a firm are entitled to the preference of having their debts paid out of the partnership funds. *Ib.*

A judgment against one of the partners of a firm will authorize a levy on his interest in the partnership property. *United States v. Williams*, 253.

But the debts of the partnership must be first paid. *Ib.*

When necessary, the officer may take possession of the entire goods. *Ib.*

But this step ought not to be taken if it can be avoided, as it breaks up the partnership. *Ib.*

If the solvent partner make fair propositions, which will save the officer from injury, they ought to be accepted. *Ib.*

Under such circumstances the partner, if indicted for resisting the officer, may give in evidence the facts. *Ib.*

PARTNERS—Continued.

A purchase of goods made by two partners who take a third partner, an action against the three can not be maintained by the seller, who had no knowledge of the change of the partnership. *Atwood v. Lockhart*, 350.

There was no implied promise to the plaintiff by the third partner. *Ib.*

The plaintiff and the defendants being partners dissolved, the defendants agreeing to pay the plaintiff \$6,872 72. In payment French gave his note for \$3,000, and the other defendant agreed to pay lands, etc. Plaintiff averred he had always been ready to execute a conveyance, etc. Demurrer sustained. *Barbee v. Willard*, 356.

After a dissolution of partnership, neither partner, by any note in writing, can bind the other. *Lockwood v. Comstock*, 383.

In this view a note is a new contract, though it be given to pay a debt of the firm. *Ib.*

An authority to one party to settle the accounts of the firm, collect and pay its debts, does not authorize the individual to give a note in the name of the late firm. *Ib.*

If a partner withdraws, pays taxes on his lands, etc., the creditors do not acquire a lien on the lands. He holds them subject to those debts as others. *United States v. Duncan*, 607.

If an administrator appropriate partnership property to the payment of taxes and expenses of administration, this will not affect a prior lien of the United States. *Ib.*

If one of the partners be indebted to the United States, the claim does not reach the partnership property. *Ib.*

If a partner die insolvent, and indebted to the United States in a large sum, a decree of a State court, requiring the payment of the partnership debts out of the funds in the hands of the administrator does not impair the priority of the United States. *Ib.*

PATENT RIGHTS.

When the evidence is conflicting, on a bill to enjoin the defendant from infringing his patent right, the court will direct an issue, if the right has not been established at law. *Parker v. Hatfield*, 61.

Or the matter will be referred to a master to examine, take evidence, and report. *Ib.*

On a report favorable to the complainant an injunction will be allowed. *Ib.*

The assignee of a patent takes no interest, under an extension of it, unless the assignment be special. *Brooks v. Bicknell*, 64.

The license of a machine, under the decision of the Supreme Court, may run the machine, under the extension. *Ib.*

There is no infringement of a combined machine, unless all the parts which constitute the combination be used. *Brooks v. Bicknell*, 70.

 Patent Rights.

PATENT RIGHTS—Continued.

The claim of Buck, in his cooking stove, as his own invention is, the flues described in combination with the extended oven. *Buck v. Gill*, 174.

And as the defendants appeared to have infringed the right, a preliminary injunction was granted. *Ib.*

Where the use or sale of a patent has not exceeded two years before the application, the act of the 3d of March, 1839, declares that it shall not invalidate the patent. *Root v. Ball & Davis*, 177.

The same patent can not include inventions for two distinct machines. *Ib.*

But a claim for a combination of mechanical powers, and the invention or improvement of one or more parts of which the combination consists, may be in one patent. *Ib.*

A general assignment of a patent gives the assignee no interest in its renewal. *Phelps v. Combstock*, 353.

But when the assignment is special, and gives such an interest, it will convey it. *Ib.*

A patent may be assigned in part or the whole of it. *Parker v. Haworth* 370.

The machinery complained of, if the same in principle, is an infringement *Ib.*

Parker's patent is for improvements on known machinery, and a combination of mechanical powers. *Ib.*

There can be no infringement of the combination, which does not embrace all the parts. *Ib.*

But it is an infringement to adopt any improvement of the plaintiffs of any of the parts of the combination. *Ib.*

An inventor, under his patent, claims no monopoly. *Ib.*

A patent right can not be sustained for making an article of a new material according to a known mode. *Hotchkiss v. Greenwood*, 456.

If the material be new, as a compound invented, a patent right may be claimed for that. *Ib.*

The invention must relate to something new in structure or material. *Ib.*

Door knobs having been made of glass, wood, brass, and other materials, the making of the same with potters ware or porcelain, a material long known, will not entitle any one to a patent. *Ib.*

If the mode of fastening the shank to the knob be the same as has been done in fastening the shanks to knobs made of other materials, there is no invention to sustain an exclusive right. *Ib.*

And this is the case though the porcelain may be more valuable than knobs made of any other material. *Ib.*

It is not essential to the validity of an assignment of a patent right between the parties, etc., as against strangers, that it should be recorded in the patent office. *Cass v. Redfield*, 526.

The record is notice to purchasers. *Ib.*

Perjury. Pleadings.

PATENT RIGHTS—*Continued.*

The renewal is for the benefit of the inventor. *Ib.*

The individual who holds the original right patented, and also an improvement on that right, must assert his entire right for an infringement. *Ib.*

To show a violation of the patent the declaration need only aver, that the defendant has constructed, and sold to others, the thing patented. *Ib.*

The invention, to sustain a patent, must be new and useful. *Roberts v. Ward*, 565.

PERJURY.

The act of 1825, in relation to perjury, being a general law, embraces all subsequent cases. *United States v. Nichol*, 23.

Where the clerk of a court administers an oath as to the travel of a witness it is not perjury or false swearing within the act of Congress. *United States v. Babcock*, 113.

To come within the act the oath must be required by law or usage. *Ib.*

The above oath was required by neither. *Ib.*

A ministerial officer can not institute such a usage. *Ib.*

On a joint answer each individual may be indicted, if false, for perjury. *Davis v. Davidson*, 136.

PLEADINGS.

The traverse of a plea must be direct and not argumentative. *Mower v. Burdick*, 7.

If the citizenship be falsely alleged, advantage should be taken by plea. *Hilliard v. Brevoort*, 24.

Where a judgment is a nullity, for want of notice to defendant, *nul tiel* record may be pleaded for that which can have no effect, is not a record, set out in the declaration. *Thompson v. Emmert*, 96.

To a judgment on a penal bond, to pay the debts of a certain firm, the obligors can not claim an off-set on notes against one of the partners. *Bergen v. Williams*, 125.

A replication is defective, to a plea of discharge in bankruptcy, which does not state the debt sued for was not placed on the schedule. *Assignee of Richey v. Spencer*, 168.

To an action for an infringement of a patent right, a plea that the thing claimed to have been invented was in use and for sale before the application for the patent, is demurrable, unless the plea aver an abandonment, or that such sale or use was more than two years before the application. *Root v. Ball and Davis*, 177.

The defendant, in a patent case, may plead a special plea, or file the general issue, with notice. *Ib.*

A demurrer to a bill admitting acts charged in the bill, which show an

Pleadings. Practice.

PLEADINGS—*Continued.*

assumed agency in redeeming land sold for taxes, and other acts, which were designed to secure a title in the land, will be overruled. *Schedda v. Sawyer*, 181.

Where the statute of limitations has run against a judgment, it may be pleaded to a *sci. fa.* to revive the judgment. *Simpson v. Lassalle*, 352.

A plaintiff who sues on a contract in which he was to perform certain things must show that he had done or offered to do what he was required to do. And if no such averment be made declaration is demurrable. *Barbee v. Willard*, 356.

To an action of assumpsit defendants pleaded non-assumpsit, and that the note was signed by Goodwin as a partner of Walcott, in both their names, after the partnership had been dissolved. *Frazer v. Walcott et al.*, 365.

The above plea was sworn to. Held by the court that the note could not be received in evidence. *Ib.*

Where a patent right has been infringed the defendant not knowing of the plaintiff's right at the time, no more than compensatory damages should be given. *Parker v. Corbin*, 462.

Under other circumstances, the damages may exceed the above. *Ib.*

In pleading it is unnecessary to set out the law of any State, as the courts of the United States take notice of such law without proof. *Jones v. Hays*, 521.

The replication is not good which does not answer the plea. To a plea of the statute of limitations the plaintiff replies that he lived in another State. This is not an exception within the statute. *Ib.*

A special plea or notice must be filed thirty days before the term in a patent case, or the plaintiff will be entitled to a continuance. *Phillips v. Combstock*, 525.

The option to file the general issue and give notice, does not take away the right to set up the special matter in a plea. *Ib.*

An unnecessary plea will, on motion, be directed to be withdrawn as improperly incumbering the record. *Ib.*

If a plea answer only a part of the count in the declaration it is demurrable. *Culbertson v. Wabash Navigation Company*, 544.

The common law order of pleading is observed in this court. *Evans v. Desenport*, 574.

A plea to the jurisdiction must first be pleaded. *Ib.*

The citizenship alleged in the declaration need not be proved, unless denied by plea. *Ib.*

A breach alleged in the terms of the bond or contract is sufficient. *Berger v. Williams*, 577.

PRACTICE.

A judgment being entered on the penalty of a bond, the claims of creditors

Remedy. Receiver. Removal of a Cause from State Court. Revivor.

PRACTICE—Continued.

intended to be secured by it, may be enforced by *sci. fa.* *Berger v. Williams*, 125.

A judgment in behalf of the creditors against the debtors is *prima facie* evidence of the sum due, as against the sureties on the penal bond. *Ib.*

An offset of claims against the original debtors can not be set up. *Ib.*

The bond was to secure the creditors named. *Ib.*

PRINCIPAL AND SURETY.

See SURETY.

PRIORITY OF THE UNITED STATES.

The priority of the United States supersedes State laws, as to the distribution of property. *United States v. Duncan*, 108.

PROMISSORY NOTE.

Taking a note is no discharge of an existing debt, unless there be a special agreement to that effect. *Allen v. King*, 123.

Taking such a note imposes diligence on the holder. *Ib.*

And if he fail to use diligence he makes the note his own. *Ib.*

REMEDY.

If the acts of State officers be illegal there is a remedy in the courts of the Union as well as in the courts of the State. *Carroll v. Perry*, 26.

The mode of redress, by a person illegally arrested is by motion. *Ib.*

The law of the contract must be regarded and enforced, wherever suit may be brought. *Mathuson v. Crawford*, 540.

But this law can not embrace the remedy. *Ib.*

The remedy belongs to the State where suit is brought. *Ib.*

RECEIVER.

A court will sometimes appoint a receiver to pay the annual charges on the mortgaged premises. *Latimer v. Moor*, 110.

This will be done if the land mortgaged is not worth the debt. *Ib.*

REMOVAL OF A CAUSE FROM STATE COURT.

A petition to remove a cause to the circuit or district court of the United States, which was granted, creates no uncertainty, as the removal can only be to the circuit court. *McVaughier v. Cassilly*, 351.

A suit can not be removed from the State court into the circuit court of the United States where a part of the defendants are citizens of the State where suit is brought and a part of some other State. *Wilson v. Blodgett*, 362.

REVIVOR.

At common law, all actions on contract survives. *Jones v. Vanzandt*, 599.

Under the statute of Ohio, adopted by Congress, certain actions survive. *Ib.*

 Slaves. Statutes of a State.

SLAVES.

The owner of a slave has a right to claim him under the law and the constitution where slavery does not exist. *Giltner v. Gorham*, 402.

There is no principle in the common law, in the law of nations, or of nature, which authorizes such a reclamation. *Ib.*

A parol authority to his agent is sufficient to authorize a seizure of a fugitive from labor. *Ib.*

To make a person liable for a rescue, in such a case, he must act knowingly and willingly. *Ib.*

But this knowledge that the colored person is a fugitive from labor is inferable from circumstances. *Ib.*

To every one who mingles with the crowd, it is not necessary that the agent should state on what authority he proceeds. *Ib.*

It is enough that he states it generally. *Ib.*

And one of a crowd who interposes by manual force, or by encouraging others, by words, to rescue a fugitive, is responsible. *Ib.*

But he does not make himself responsible when he endeavors to prevent a breach of the peace. *Ib.*

The agent, in seizing a fugitive from labor acts under the sanction of law, no warrant being necessary. *Ib.*

When a rescue is made by the continuous action of a crowd, any one who took a part in the continuous action is responsible. *Ib.*

A female fugitive from labor, having had a child during her residence in a free state, on an action for her value, the child being not claimed can not be included. *Ib.*

An action against one or more persons for harboring or secreting fugitives from labor whether brought for the penalty or the value of the slaves is founded on the constitution of the United States and act of Congress. *Ray v. Donnell*, 504.

In such an action, the plaintiff must prove the ownership of the slaves, and that they escaped from his service. *Ib.*

A removal of the slaves from the place where they had been secreted with the view of returning them to their master, so that they were enabled to escape from the pursuit of their master, is a harboring and secreting of them, within the act of Congress. *Ib.*

The circumstance of their removal is sufficient to show a knowledge that they were fugitives. *Ib.*

Whether a verdict for the plaintiff extinguishes his right to the fugitives not a question for the jury. *Ib.*

The value of the services of the slaves is the criterion of damages. *Ib.*

STATUTES OF A STATE.

A statutory proceeding, which is not according to the course of the common law, must be strictly pursued. *Boswell v. Dickerson*, 262.

STATUTE OF A STATE—Continued.

The courts of the United States will follow an established construction of a state statute. *Nessmith v. Sheldon*, 375.

It is important that there should be only one rule of property in a state. *Ib.*

The rule of construction is followed without regard to its correctness. *Ib.*

In the construction of statutes the intent of the legislature must be ascertained. *United States v. Warner*, 463.

STEAM BOAT NAVIGATION.

For misconduct, negligence, or inattention in the pilot, captain, etc., on a steam boat, from which death results, the individual is punished as for manslaughter. *United States v. Warner*, 463.

Malice is not required to constitute the offence. *Ib.*

Drowning resulting from collision through negligence is within the statute *Ib.*

If the passengers by their own imprudence were drowned, the defendant is not guilty. *Ib.*

It is otherwise if the passengers lost acted with ordinary prudence. *Ib.*

It was the duty of the officers to ascertain as soon as possible, after the collision the extent of the injury of the boat. *Ib.*

STATE.

Indian lands reserved can not be withdrawn from the jurisdiction of a state except by its consent. *Lowry v. Weaver*, 82.

It may tax them, and make them responsible for the payment of debts. *Ib.*

SURETY.

In Indiana securities on a replevin bond are entitled to have their land sold under the law in force at the date of the bond. *Stockwell v. Kemp*, 80.

A sale on other principles will be set aside on motion. *Ib.*

SURVEY.

Causes of disputes between what was called the old and new lines in Symmes' purchase. *Buel v. Tuley*, 268.

Survey by which a purchase was made to stand. *Ib.*

If not seen at the purchase, must be established by authority. *Ib.*

Marked lines and corners control courses and distances. *Robinson v. Moore*, 279.

In the Virginia Military tract surplus land does not vitiate the survey. *Ib.*

SURVIVORSHIP.

When a debt is due to two individuals, both of whom die before the amount

Symmes' Purchase. Tax.

SURVIVORSHIP—*Continued.*

is adjusted, and the settlement is made after the death of both, with the executor of one, and two notes were given to him for the balance it may be recovered in his name. *Callin v. Underhill*, 337.

The doctrine of survivorship does not apply to a single transaction of this character. *Ib.*

It is not doubted, however, that had only one of the parties died, the survivor might have maintained his action for the amount due. *Ib.*

SYMME'S PURCHASE.

This purchase was completed only for one million of acres between the Miami rivers. *Budd v. Tuley*, 268.

TAX.

Lands purchased of the United States and paid for, though not patented, may be taxed by a state. *Carroll v. Perry*, 25.

Property of every description, under the jurisdiction of a State may be taxed. *Ib.*

In the exercise of this power the federal government have no control. *Ib.*

To make a valid title on a sale for taxes, all the requisites of the law must be complied with. *Miner v. McLean*, 138.

The county treasurer and collector must return, under oath, the delinquent lands to the county auditor, or there can be no forfeiture of such lands. *Ib.*

The county is required to make a record of such return which can not be altered by parol. *Ib.*

In selling land for taxes the law must be strictly followed. *Moore v. Brown*, 211.

And this especially applies to the notice of sale. *Ib.*

When legal notice has not been given of a sale for taxes the deed is void. *Ib.*

Under the revenue law of Illinois, passed February, 1839, the circuit court acting as a court of limited and special jurisdiction, it is necessary to show that every thing was, and how done, that is required by law to be done, to give it jurisdiction. *Mayhew v. Davis*, 213.

A collector of taxes must make a demand for taxes upon the owner of land, before a judgment can, properly, be rendered against it. *Ib.*

The list of lands forfeited for the non payment of taxes required by law, if not made as required the subsequent proceedings are void. *Raymond v. Longworth*, 418.

Such list must have the seal of the auditor of state. *Ib.*

It must be signed by the auditor. *Ib.*

The land sold was stated on the tax list to be five acres in Sec. 24, township 4, range 1, is vague and the sale consequently void. *Ib.*

To render an auditor's deed evidence of title to land sold for taxes, under the

Tenant. Title. Trover. Trustee. Usage.

TAX—Continued.

law of 1827, it must be first shown that the requisitions of the law have been complied with. *Arrowsmith v. Burlingim*, 490.

TENANT.

A tenant for life is bound to keep down the interest of incumbrances, although the whole of the rents are exhausted by it. *Latimer v. Moore*, 110.

TITLE.

To constitute a legal title to land sold for taxes, all the substantial requisites of the law must be complied with. *Miner v. McLean*, 138

A title from the United States to a deceased person, under the act of Congress anures to the benefit of his heirs. *Schedda v. Sawyer*, 181.

At common law any act is void which is done in the name of a deceased person. *Ib.*

Color of title in good faith must be such a title as would pass the land of itself, if a better title be not shown, this is necessary under the statute. *Arrowsmith v. Burlingim*, 490.

The belief of a tenant that his title is good, must be a legal and intelligent belief, and must depend upon his title. *Ib.*

A presumption of title may arise from long possession, under such circumstances as are favorable to such a presumption. *Baird v. Wolfe*, 549.

But it may be rebutted by circumstances or positive proof. In many cases the court will refer the presumption to the jury for their consideration and decision. *Ib.*

TROVER.

A demand and refusal, or an actual conversion, is necessary to sustain an action of trover. *Chapin v. Siger* 375.

TRUSTEE.

When property is received in trust, and the trustee sells it and receives the consideration and appropriates it, he is liable, the same as an agent, should the sale not be objected to. *Barker v. Root*, 572.

USAGE.

A general usage in navigating a river should be followed. *Halderman v. Beckwith*, 286.

A descending boat when apprehensive of a collision will stop her engine and float. *Ib.*

The ascending boat to choose her side. *Ib.*

The law of the river is established by usage, and this must govern those who navigate it. *Barillette v. Williamson*, 589.

USAGE—*Continued.*

All are presumed to know an established usage, and are expected to conform to it. *Ib.*

By this usage a descending boat is required to run in the current near the middle of the river, the ascending boat to keep near the right shore. *Ib.*

This being the usage, if either turn out of her course, so as to run into the other, the owners of the boat leaving her track are responsible for the damages done. *Ib.*

The descending boat, by the usage, as appears from the testimony, on seeing the approach of the ascending boat, is required to stop her engines and float, leaving to the other boat a choice of sides. *Ib.*

Under such circumstances, in view of the usage, it would be hazardous for the descending boat to back her engine as that might bring her in contact with the other boat. The descending boat may act upon the presumption that the other boat does not intend to run into her. *Ib.*

And any deviation from the established usage might create embarrassment, and, perhaps, cause a collision. *Ib.*

USURY.

A purchase of a bank or of an individual's notes at a discount, is not usury; unless such purchase was a device to charge more than the legal rate of interest. *Lafayette Bank v. Illinois Bank*, 208.

To constitute usury there must be a corrupt loan of money. *Ib.*

There is no usury in charging the usual exchange on a bill drawn in Indiana, payable in New York. *Orr v. Lacy*, 243.

A purchase of a bill, at whatever discount, not done to cover usury, is not usurious. *Ib.*

The notes of a western specie paying bank less valuable than eastern paper, the difference may be covered by contract, without usury. *Ib.*

The purchase of promissory notes signed by an individual or issued by a bank, if made *bona fide*, is not usurious. *Judy, Administrator v. Gerard*, 359.

If the purchase, however, was a device to charge a higher rate of interest than the law authorizes, it is usury. *Ib.*

Depreciated bank notes may be sold in the market at a greater or less price, as may be agreed upon between the parties. Like any other commodity, they can be bought and sold without usury. *Ib.*

But any device or cover which may be resorted to, to evade the statute of usury, is corrupt and usurious. *Ib.*

VARIANCE.

Words of surplusage, not descriptive of the bill, but of the place where it is payable, is no variance. *Orr v. Lacy*, 243.

Verdict. Warranty. Warehouse Receipt. Wills. Witness.

VERDICT.

A verdict on an issue at law, directed by a court of chancery, will not be set aside unless it shall be clearly against evidence. *Brooks v. Bicknell*, 70

WARRANTY.

A deed of warranty may be good, though it do not contain all the usual covenants, technically. *Bronson v. Cahill*, 19.

WAREHOUSE RECEIPT.

A fabricated warehouse receipt, representing that a large amount of pork had been received by defendant, subject to the order of the plaintiff, on which he accepted and paid a draft for \$12,000, is a ground for an action against the warehouse man to the extent of the injury received. *Surydam v. Watts*, 162.

WILL.

By a law of Indiana, a will made and recorded in any other State, according to its laws, is good in Indiana; and a copy from such record, duly certified, is evidence. *O'Brien v. Woody*, 75.

WITNESS.

A witness who has, in acting as agent, exceeded his power, so as to make himself responsible, is not a competent witness to prove that his principal ratified the contract subsequent—although the witness may be released from liability, under the written contract made by him. *Peckham v. Lyon*, 45.

An accomplice may be a witness from the necessity of the case. *United States v. Lee*, 103.

And if so used, and from his testimony, he acted apparently in good faith, and gives evidence material to the issue, he ought not to be prosecuted. *Ib.*

The faith of the government is pledged, by his disclosures, not to take advantage of them. *Ib.*

After he has made them, he can not be tried without subjecting him to prejudice. *Ib.*

A deposition to contradict a witness, will not be received unless the question as to the fact is as distinctly put to the witness. *Chapin v. Siger*, 378.

A witness can not be discredited by that he made a certain remark which on his examination he does not recollect. *Giltner v. Gorham*, 402.

A witness who states a falsehood that does not arise, probably from mistake or misapprehension, will not be believed by the jury in other parts of his evidence, unless corroborated. *Ib.*

WITNESS—Continued.

Where the credibility of the witness is so impeached as to create strong doubts as to the truth of his testimony, the jury may decide the controversy on the other testimony in the case. *Ray v. Donnell*, 504.

Where the general character of a witness has not been impeached, though he may have been contradicted by other witnesses, his general good character can not be proved. *Ib.*

A witness at whose instance an ejectment is brought, and who is the assignee of a part of the consideration for which the land was sold, and the suit being brought on a failure to pay the consideration, is not a competent witness. *Baird v. Wolfe*, 549.

Where there is a conflict in the testimony, the jury must decide on the credibility of the witnesses. *Barrett v. Williamson*, 389.

This may often depend upon the opportunity witnesses had to observe the facts which they have sworn to. *Ib.*

In collision cases, witnesses often become excited and alarmed, so as not to be in a condition to see and detail facts accurately. *Ib.*

WRIT.

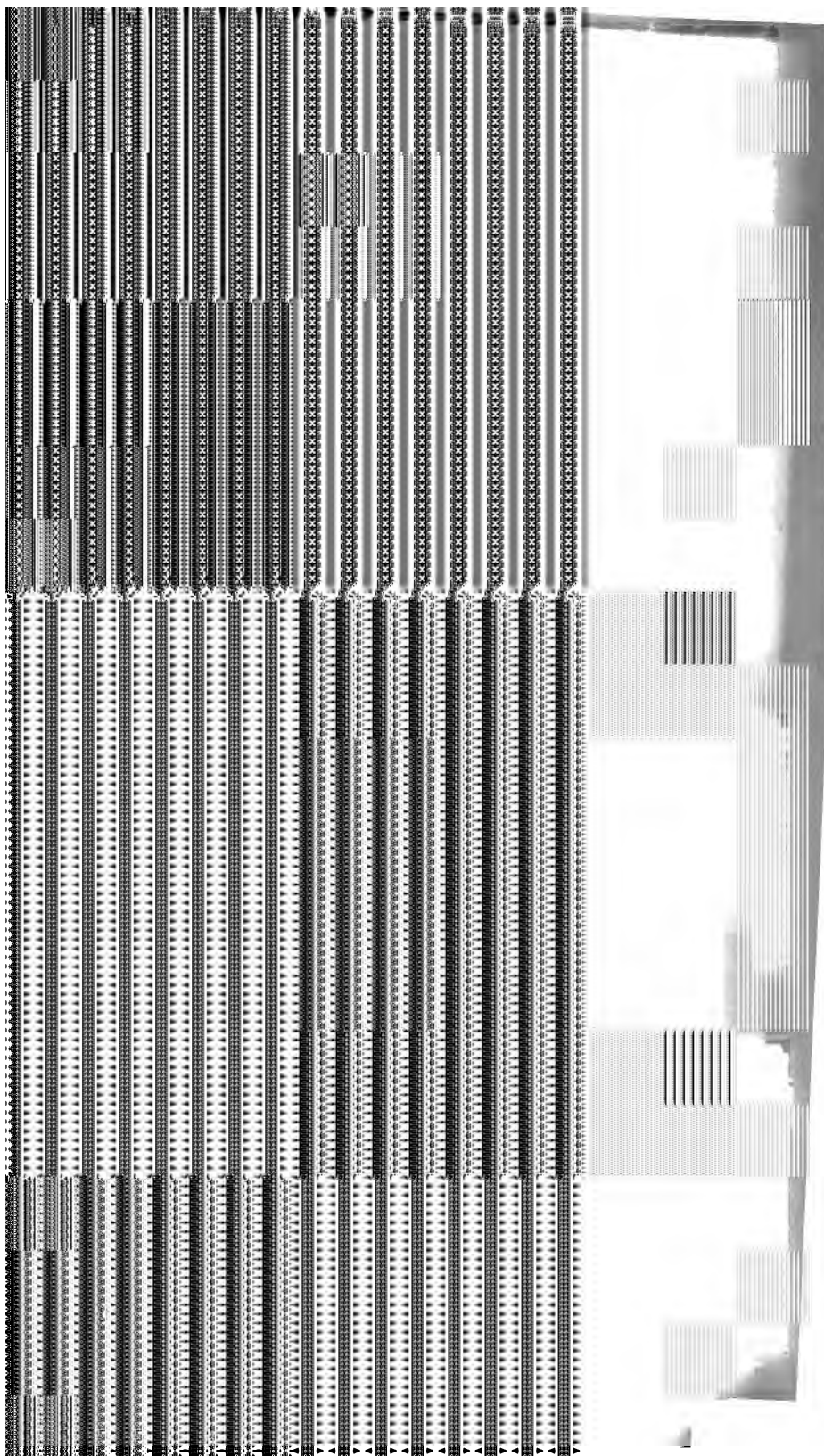
The indorsement on the writ, required by the State statute, which has been adopted, may be objected to on a motion to quash the writ. *Miller v. Gages*, 436.

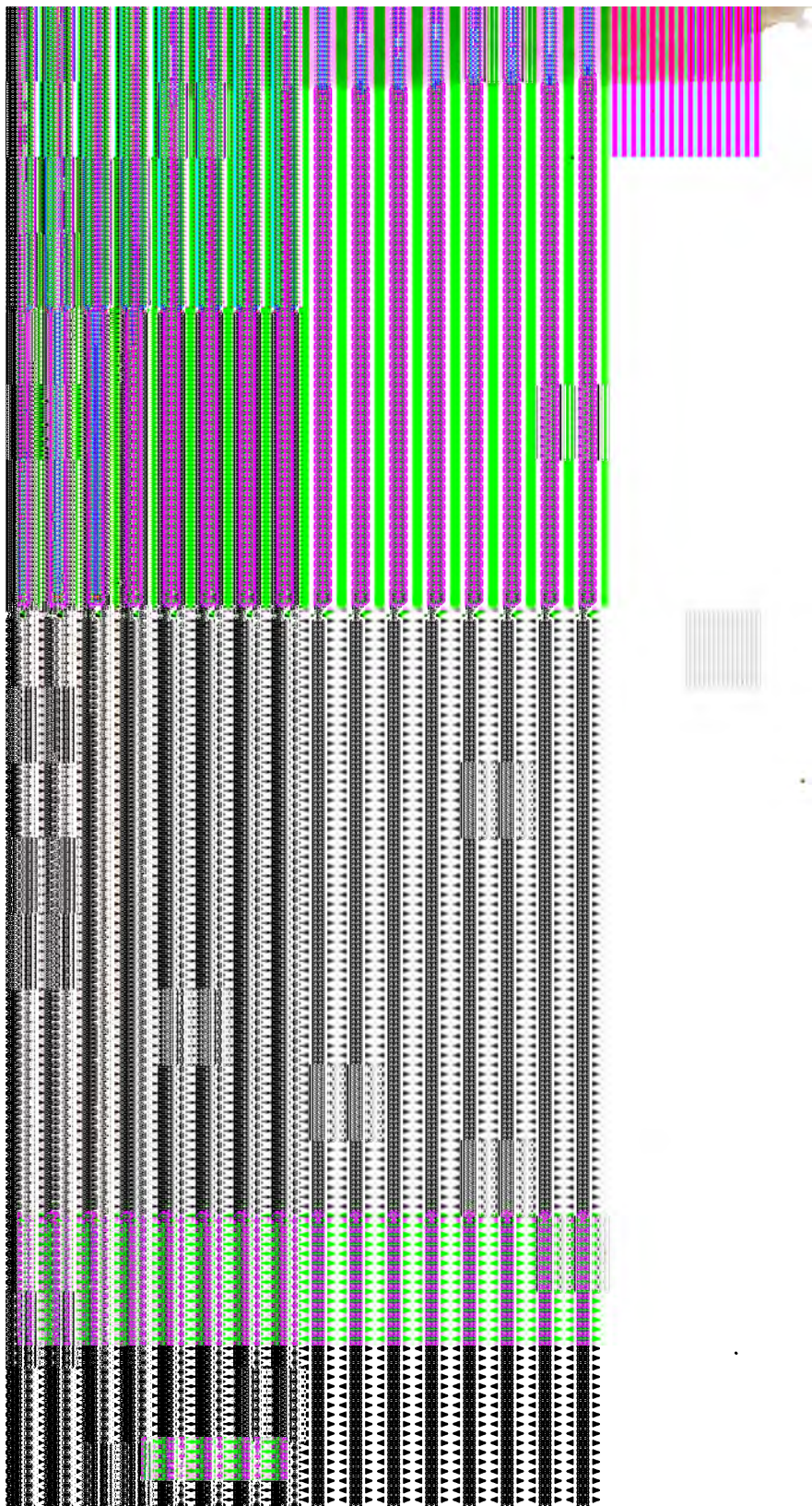
In such case, an amendment would be permitted. *Ib.*

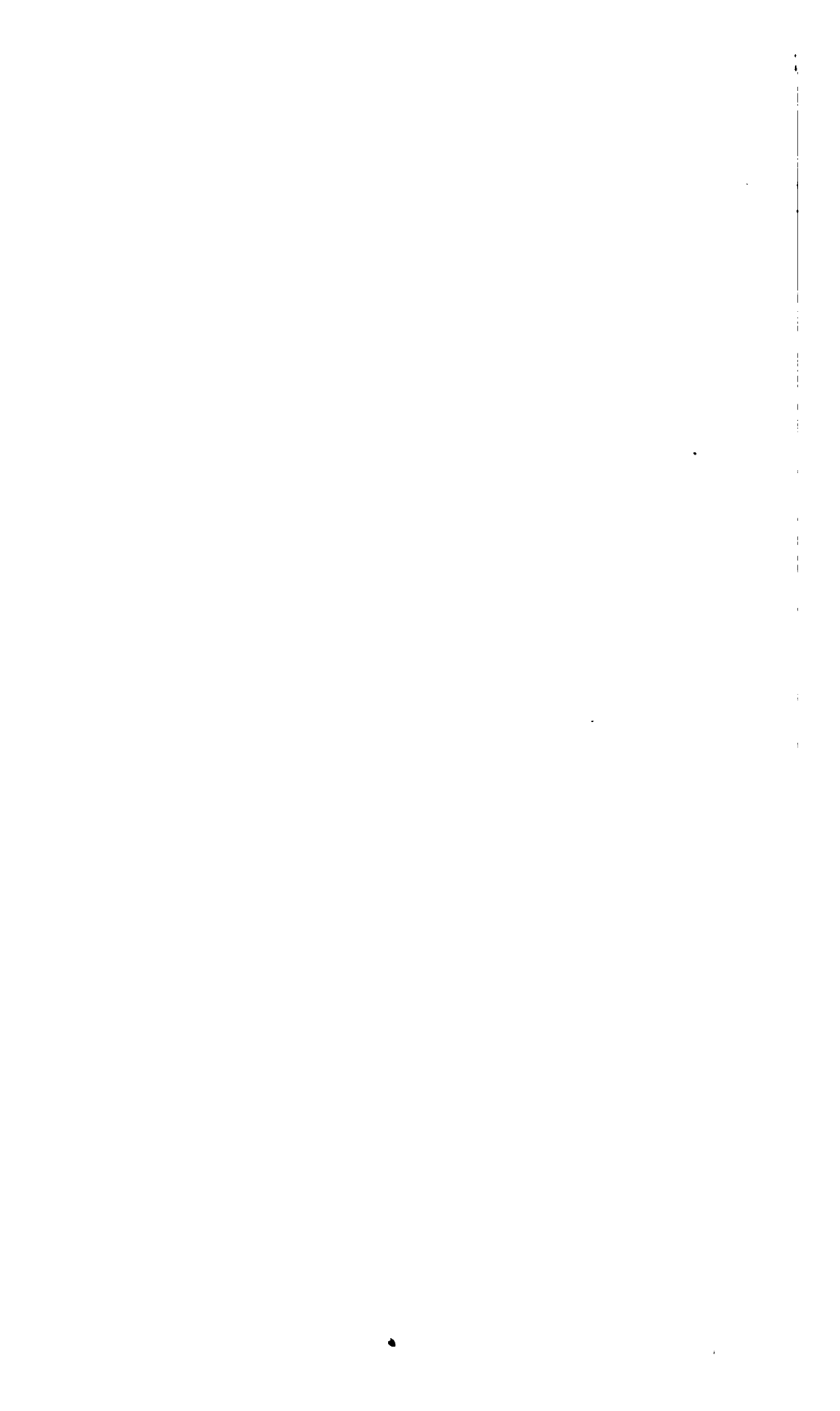
A neglect to make the indorsement, is no ground for a plea in bar. *Ib.*

A plea in abatement, is the only one that could be filed. *Ib.*









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